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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

HOFLEY MANUFACTURING COMPANY,
Appellant,

vs.

ROBERT WILLIAMS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether the appellant, an employer, was denied due process because of the statutorily-authorized composition of the Appeal Board panel which included employee and general public representatives, but no employer representative.

Whether the appellant, an employer, was denied equal protection because of the statutorily-authorized composition of the Appeal Board panel which included employee and general public representatives, but no employer representative.* **

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*All the parties appearing in the litigation before the Michigan Supreme Court are identified and set forth in the caption of this Jurisdictional Statement.

**The appellant, Hofley Manufacturing Company, is not owned by any parent corporation, does not have an ownership interest in any subsidiaries (except wholly-owned subsidiaries) and does not have any affiliates.

Dated: October, 1988.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

HOFLEY MANUFACTURING COMPANY,
Appellant,

VS.

ROBERT WILLIAMS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

Hofley Manufacturing Company, the appellant, appeals from the final judgment of the Michigan Supreme Court, decided June 9, 1988, holding that the statutorily-authorized composition of the Workers' Compensation Appeal Board panel in this case did not deny the appellant, an employer, due process of law. The Appeal Board panel included employee and general public representatives, but no employer representative.

OPINIONS BELOW

The majority, concurring and dissenting opinions of the Michigan Supreme Court are reported at 430 Mich. 603 and 424 NW2d 278. (See Appendix A.) The Court's order denying rehearing is reported at 431 Mich. 1202. (See Appendix E.) The orders and opinions of the lower tribunals are not reported. (See Appendices B-D.)

JURISDICTION

This action for workers' compensation weekly benefits draws in question the validity of the 1985 amendment to §261 of the Michigan Worker's Disability Compensation Act on the ground that the unbalanced composition of appeal board panels is repugnant to the Fourteenth Amendment, United States Constitution. The statute was upheld by the Michigan Supreme Court in a judgment entered June 9, 1988. The appellant's timely Motion for Rehearing was denied by order of July 27, 1988. The appellant mailed Notice of Appeal to the Michigan Supreme Court on August 23, 1988, with copy to the Michigan Workers' Compensation Appeal Board, the tribunal possessed of the record. (See Appendix F.) The jurisdiction of this Court is invoked under 28 USC §1257(2).

CONSTITUTIONAL PROVISION AND STATUTES

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

1985 PA 103, §251, MCL 418.251; MSA 17.237(251) provides in pertinent part:

> "(1) A worker's compensation appeal board is created, referred to in this act as the board. Except as provided for in subsection (2), the board shall consist of 15 members, a majority of whom shall be attorneys at law who are members in good standing of the

state bar of Michigan. Except as provided for in subsection (2), *of the board members, 5 shall be representative of employee interests in the state, 5 members shall be representative of employer interests of the state, and 5 members shall be representative of the general public.* A member of the board shall devote his or her entire time to and personally perform the duties of the office and shall not engage in other business or professional activity. The governor, with the advice and consent of the senate, shall appoint the members for a term of 4 years, and until their successors are appointed and qualified . . . A member of the appeal board may be removed by the governor for good cause. Good cause for removal shall include, but not be limited to, lack of productivity or other neglect of duties.

"(2) Until July 1, 1989, the governor, with the advice and consent of the senate, may appoint senior worker's compensation magistrates, senior hearing referees, former hearing referees, former worker's compensation magistrates, and other qualified individuals to the appeal board in order to fill a vacancy or to temporarily increase the number of members on the appeal board to expedite decisions in cases before the board. All persons appointed under this subsection shall be representatives of the general public." (Emphasis added).

1985 PA 103, §261, MCL 418.261; MSA 17.237(261) provides in pertinent part:

"(2) Except as otherwise provided for in this act, a matter pending review before the appeal board shall be assigned to a panel of 2 members of the board for

disposition, with each panel comprised of 1 member each from the employee and employer representatives, *the employee and general public representatives, the employer and general public representatives,* or 2 members representative of the general public. The decision reached by the assigned members of a panel shall be the final decision of the board. If the members of a panel cannot reach a decision, the chairperson of the board shall assign a third panel member to review the matter. The third member shall be from a designated representative group that is not already represented on the panel, except for a panel of 2 members representative of the general public, in which case the third member shall be a representative of the general public. The decision of the third member shall be controlling and shall be considered to be the final decision of the board." (Emphasis added).

STATEMENT UNDER RULE 28.4(c)

Since this proceeding draws in question the constitutionality of a statute of a State, and the State or any agency, officer or employee thereof is not a party, it is noted that 28 USC §2403(b) may be applicable.

STATEMENT OF THE CASE

By opinion and order mailed September 8, 1986, the Michigan Workers' Compensation Appeal Board affirmed the decision of the hearing referee and awarded Robert Williams, the appellee, weekly compensation for a closed period. The opinion of the two-member Appeal Board panel was authored by Member Hughes, a "general public

representative", and was signed by Member Fernandez, an "employee representative". There was no "employer representative" on the Appeal Board panel. The appellant, Hofley Manufacturing Company, included a due process challenge to the composition of the panel in its timely Application for Leave to Appeal to the Michigan Court of Appeals.

By order certified November 26, 1986, the intermediate-level Court of Appeals denied the appellant's Application for Leave to Appeal. On June 30, 1987, the Michigan Supreme Court granted the appellant's Application for Leave to Appeal to that Court, limited to the issue whether the appellant was denied due process because of the statutorily-authorized Appeal Board composition in this case. (See Appendix G.)

The Michigan Supreme Court initially determined that the appellant had a property interest in this litigation and was, therefore, entitled to the protection of the Fourteenth Amendment's Due Process Clause. (Appendix A, pp. A11-12)

The Court then turned to the statute, particularly §251. The Court recognized a presumption of constitutionality which, while not conclusive, was "powerful enough to permit even a strained construction when necessary to save constitutionality." (p. A14) The Court said that the word "representative" is often used in a manner synonymous with "agent", but is also frequently intended as a synonym for a "typical example or specimen". The Court adopted the latter meaning. (p. A15)

Returning to its constitutional analysis, the Court noted with copious citation that both it and this Court have held that biased decision making offends the con-

stitutional right to procedural due process. However, the Court rejected the appellant's arguments that three interests resulted in constitutionally impermissible levels of bias: (1) a pecuniary interest resulting from the limited four-year terms of appeal board members, (2) a statutorily designated interest, and (3) a perceived interest.

The majority opinion of the Michigan Supreme Court was signed by four justices of the seven-member court. One of those justices also joined in the concurring opinion of a fifth justice. The concurrence disagreed with two conclusions of the majority—that Board members do not represent an ongoing economic interest, and that the presence of a general public member on the two-person panel cures any problem. (p. A29) The concurrence concluded, however, that unfairness inhered only in the fact that the balance of the Board panels was not consistently weighted, thus posing an equal protection question which had not been raised as an issue by the appellant. (pp. A29, 32-33)

Two justices dissented on the basis that Board members, while not "agents", will use past experience and alignments in reaching a decision regarding a case. (p. A35) The dissent was influenced by the fact that it would impose no greater financial burden on the State to provide an alternative decision making procedure—a two-member panel comprised of one employee and one employer representative or two general public representatives—which would greatly reduce the risk of prejudice. pp. A36-37)

The appellant timely filed a Motion for Rehearing and argued that the majority's interpretation of "repre-

sentative" was wrong and missed the point. The appellant noted that the Court's interpretation may cure future due process problems, but queried how it could cure the prior application of the statute. The appellant also argued that it was manifest injustice for the Court to affirm the appeal when four members of the seven-member court felt that the Appeal Board practice was unfair—two on due process grounds and two on equal protection grounds.

The Michigan Supreme Court denied rehearing by order of July 27, 1988.

THE FEDERAL QUESTION IS SUBSTANTIAL

The right to a hearing before a fair and impartial decision maker is one of the rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In *Goldberg v. Kelly,* 397 U.S. 254, 271 (1970), this Court indicated that "an *impartial* decision maker is essential" to Due Process. (Emphasis added). Due Process demands impartiality of quasi-judicial as well as judicial tribunals. *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242-243 and N2 (1980).

However, a showing of actual partiality or bias is not necessary. The appearance of partiality is sufficient to deny a fair hearing. In *In re Murchison,* 349 U.S. 133, 136 (1955), this Court reversed the decision of the Michigan Supreme Court and stated the basic rule as follows:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our*

system of law has always endeavored to prevent even the probability of unfairness. To this end, no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' *Tumey v. State of Ohio,* 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. *But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offut v. United States,* 348 U.S. 11, 14." (Emphasis added).

In the instant case, the appearance of partiality is created by State statute that attaches to each Workers' Compensation Appeal Board member a designation as representative of certain interests—of either employees, employers, or the general public. These designations are applicable not just to the initial appointment of the members, but they invade the daily life of the Appeal Board, being determinative of the composition of the panel that is assigned to review any given case.

The history of the statute over the last decade establishes clearly that the Michigan Legislature is concerned about "stacked" panels. The initial provision for designations, 1978 PA 456, effective October 16, 1978, did not

call for balanced panels, but retained the prior scheme of each member serving on panels "with other members of the board with a frequency which is as substantially equal as possible." 1978 PA 456, § 261(2).

Constitutional challenges were mounted and, before the first of these reached the Michigan Court of Appeals, the Legislature had acted to remedy the imbalance. 1980 PA 357, effective January 1, 1981, changed the overall balance of the Appeal Board. In place of six members representative of employee interests, six members representative of employer interests and three members representative of the general public (1978 PA 456, §251[1]), the Legislature provided for an equal division of the fifteen Board members among the three interest groups. 1980 PA 357, §251. The Legislature thus was easily able to balance the individual panels, providing that "each panel [shall be] comprised of 1 member each of the employee, employer, and general public representatives." 1980 PA 357, §261(2).

The purpose behind the change to two-member panels in 1985 PA 103 was to speed review. Because the Legislature retained the three representative groups, obviously a member from each group could not be on a two-member panel, so the Legislature had to address panel composition. Had the Legislature returned to the "equal frequency" scheme, some panels would have been "stacked" with two employee representatives or two employer representatives. By specifying several different combinations that it deemed acceptable, the Legislature precluded two employee representatives or two employer representatives from serving together on a panel. The Legislature also precluded an employee or employer represen-

tative from being assigned to cast the controlling vote where a member of similar designation was on a divided panel or where two general public representatives could not agree.

While the Legislature has recognized and dealt with part of the problem, it has failed to recognize and deal with the problem as a whole. The Legislature has allowed panels initially comprised of a general public representative and either an employee or employer representative, even though this is just as unfair as panels that the Legislature has precluded—those made up of two general public representatives with a dispute being resolved by either an employee or employer representative.

The general public representative on an Appeal Board panel should be neutral and impartial. If an employee or employer representative has the public representative's ear, then the chances are that the public representative will go along with that member. However, if a member of a different persuasion also has the public representative's ear, then the public representative will make a decision that could affirm either member. Kangaroo courts are not looked upon with favor in this country. When a decision is made, that decision should be made after all points of view are expressed. If only one point of view is expressed and the holder of the opposing view is not allowed to express his or her opinion, then the decision certainly cannot be said to be a fair one.

Questions regarding the constitutionality of unbalanced Appeal Board panels have come before the intermediate level Michigan Court of Appeals on no less than five occasions resulting in published opinions. The re-

sults have been mixed. *Pitoniak v. Borman's Inc.*, 104 Mich. App. 718; 305 NW2d 305 (1981), lv den 411 Mich. 1049 (1981), app dis 455 U.S. 901 (1982) (1978 PA 456 constitutional), *Warren v. Motor Wheel Corp.*, 110 Mich. App. 731; 313 NW2d 286 (1981), lv den 411 Mich. 1049 (1981) (1978 PA 456 constitutional), *Vayiar v. Vic Tanny International*, 114 Mich. App. 388; 319 NW2d 338 (1982) (1978 PA 456 unconstitutional), *Ratliff v. General Motors Corp.*, 127 Mich. App. 410; 339 NW2d 196 (1983), lv den 419 Mich. 932 (1984) (1978 PA 456 constitutional), *Williams v. Chrysler Corp.*, 159 Mich. App. 8; 406 NW2d 222 (1987) (1985 PA 103 unconstitutional).

In the instant case, the Michigan Supreme Court took its first look at the constitutionality of §261. Admittedly, the Legislature must be assumed to have intended a constitutional enactment, and the Michigan Supreme Court majority has interpreted the statute to maintain its constitutionality in that Court's eyes. Nevertheless, the appellant believes that the Michigan Supreme Court has failed to both adequately explain and protect its rights under the United States Constitution.

One major problem with the Michigan Supreme Court's decision is that the majority opinion is not what it seems. While signed by four justices, one of those justices also signed a concurring opinion that disagreed with the conclusion in the majority opinion that Board members do not represent an ongoing economic interest. The concurrence went so far as to state that the members "are expected to vote from the point of view of a particular economic interest." (p. A31) Which conclusion the justice that signed both opinions really believed in is beyond these writers' ken, but it is clear that a total of four justices out of seven signed the concurring and dissenting opinions finding that

in at least some cases the Board members will vote according to their "slant," which will be in favor of their designation.

Given how four of the justices perceived the reality of Appeal Board voting, the appellant believes that a risk of partiality must be recognized and the proper constitutional analysis should be that set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). That analysis, considering the three distinct factors of the private interest, the public interest, and the cost of an alternative procedure, was utilized only by the two dissenting justices in this case. As indicated by the dissent, elimination of the risk of partiality is cost free as §261 already provides for balanced panel alternatives to the one that sat in this case. (pp. A36-37) Furthermore, there is no identifiable interest of the state in having unbalanced panels, and even if there was, it can hardly compare with the private interest of employers in their earnings.

Even if the very limited view of the meaning of "representative" as expressed in the majority opinion is correct, notwithstanding one justice of the majority disagreeing with himself by signing the concurrence, that should not detract from application of the *Mathews* analysis. The fact is, while the Michigan Supreme Court wields tremendous power and has the ultimate responsibility of saying what Michigan law is, the Court cannot change reality. By defining "representative" as it did, the majority may well have put the Appeal Board members and the public on notice of what the designations mean; however, to the extent that the designations before that were perceived by Appeal Board members, employers, employees, the public, the Court of Appeals, and the minority members of the Supreme Court to mean something else, the Supreme

Court cannot define away what already in reality was a due process violation.

As stated, four justices found the Appeal Board composition unfair. As further stated, the appellant believes that the concurring justices erred by failing to apply the *Mathews* analysis to that unfairness. The appellant believes that in this case the distinction drawn by the concurrence between due process and equal protection is one without a difference. In *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954), this Court concluded that the concepts of due process and equal protection are not mutually exclusive:

> "But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' and, therefore, we do not imply that the two are always interchangeable phrases."

The overlap of these two concepts can hardly be clearer than in the typical case of bias or partiality.

Simply put, when two civil litigants come before a tribunal, they should be on equal footing. This is certainly true of workers' compensation proceedings in Michigan as well. To put one litigant on an unequal and disadvantageous footing, except for a proper purpose and pursuant to means rationally related to that purpose, is a denial of equal protection. When a litigant is put on that unequal footing by the partiality or bias of the tribunal, that is the essence of the denial of a "fair" and "impartial" decision maker as guaranteed by the Due Process Clause of the Fourteenth Amendment.

The concurrence stated that an employer appearing before a panel comprised of employee and general public representatives "[b]y random selection . . . finds himself before the only panel composition that places him at a disadvantage more than other" employers who find themselves before panels comprised of employer and general public representatives, employer and employee representatives, or two general public representatives. (p. A33) Logically, however, it follows from the truth of that statement that the employer is at least equally disadvantaged in comparison to the employee. That, the appellant confidently believes, is a denial of due process under all this Court's rulings that a litigant has a due process right to a fair tribunal.

The error made by the concurrence is clear. The concurrence assumed that for a proper purpose the Legislature "can" put employers at a disadvantage to employees. While that may be true, the concurrence never put that theoretical ability into the context of the present case. The concurrence did not, and indeed could not, find in §§251 or 261 a legislative purpose or intention to put employers at a disadvantage to employees (or, in the case of an employer/general public panel, the employee at a disadvantage to the employer). In fact, per the majority, the Legislature intended "to promote balanced, impartial decision making." (p. A25) And, as the concurrence itself concludes, "the change in balance is completely random and apparently without a rational basis." (p. A29)

To summarize, the composition of the Appeal Board panels is intended to be fair, but it in fact results in unfairness where an employee representative and a general public representative sit together without an employer representative. The good intentions of the Legislature

cannot be dispositive, and in this case, the remedy for the Legislature's error is cost free. Accordingly, the process due the appellant is a hearing before an Appeal Board panel of balanced composition.

The appellant acknowledges that it first specified an equal protection challenge as such in its Motion for Rehearing of the Michigan Supreme Court's judgment, and the Court simply denied rehearing. Accordingly, the appellant concedes that this Court does not have appellate jurisdiction of an equal protection question to the extent that question is exclusive of due process. Nevertheless, the appellant respectfully asks that this Court exercise its prerogative power to assume certiorari jurisdiction and address the equal protection question involving the discrimination against the appellant vis-a-vis other employers. *Flournoy v. Wiener*, 321 U.S. 253, 263 (1944).

Although the Michigan Supreme Court did not address the equal protection question, it could have. That Court has reserved for itself the discretionary power to address questions not properly preserved for review. *Reetz v. Kinsman Marine Transit Co.*, 416 Mich. 97, 101 (1982), *Morris v. Radley*, 306 Mich. 689 (1943). Accordingly, this Court does have certiorari jurisdiction over the equal protection question to the extent that question is exclusive of the due process question timely raised by the appellant and addressed by the court below. *Hathorn v. Lovorn*, 457 U.S. 255, 262-265 (1982). See also *Illinois v. Gates*, 462 U.S. 213, 218-219 (1983).

The appellant would lastly draw this Court's attention for a moment to the Michigan Supreme Court's reference to the fact that the Appeal Board is scheduled to go out of existence on July 1, 1989. However, that is not a prac-

tical or viable result in light of the Board's tremendous backlog of cases and Legislation is in progress, HB 5639, to extend the life of the Board for another two years at least. Thus, the constitutional question in this case is more significant than it may appear on the face of the majority opinion in terms of the number of future cases that will be heard by the Appeal Board.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Dated: October 19, 1988

APPENDIX

APPENDIX A

Michigan Supreme Court
Lansing, Michigan 48909

Chief Justice	Associate Justices
Dorothy Comstock Riley	Charles L. Levin
	James H. Brickley
	Michael F. Cavanagh
	Patricia J. Boyle
	Dennis W. Archer
	Robert P. Griffin

SYLLABUS

This syllabus was prepared by	Reporter of Decisions
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WILLIAMS

v

HOFLEY MANUFACTURING COMPANY

Docket No. 79949. Argued October 9, 1987 (Calendar No. 12). Decided June 9, 1988.

Robert Williams sought workers' compensation benefits, alleging injuries suffered in the course of his employment with the Hofley Manufacturing Company. A hearing referee granted benefits, and the Workers' Compensation Appeal Board affirmed. The Court of Appeals, Danhof, C.J., and Cynar and Shepherd, JJ., denied leave to appeal (Docket No. 95770). The Supreme Court granted leave to appeal, limited to

the issue whether the defendant was denied due process of law because of the composition of the two-member appeal board panel.

In an opinion by Justice Boyle, joined by Justices Levin, Cavanagh, and Archer, the Supreme Court *held*:

Use of two-member interest-designated panels of the Workers' Compensation Appeal Board does not violate the procedural due process rights of litigants under the United States or Michigan Constitutions.

1. Whether procedural due process guarantees are applicable in a particular case depends on the presence of property or liberty interests. A money judgment against a defendant is a deprivation of property; a cause of action, in itself, is a species of protected property. In this case, to the extent the procedures involved would affect the ability of the defendant to present a legitimate defense, its property rights are impaired.

2. The legislative purpose in creating the Workers' Compensation Appeal Board was to establish a board of independent stature, whose members would exercise professional judgment in hearing workers' compensation appeals. The status of the members was to be representative of employees, employers, and the general public, i.e., typical of professionals in the field employed or retained by the particular interest group. The representative nature of the board members is not interpreted as creating a continuing agency relationship of a member with a particular interest group, but as an attempt to develop a board which is fully reflective of the naturally divergent views

in workers' disability compensation law. The members are not required to be, and may not act as, agents of their respective interest groups. Rather, it is presumed that board members are unbiased.

3. Use of two-member interest-designated panels does not bind the decisions of board members, but merely insures that the membership of the board is drawn from and representative of the diverse economic interests involved in workers' compensation law. The statutory requirements for the continuing service or removal of board members ensures that there is no pecuniary interest of board members in the cases they adjudicate. Even the perception of bias is dispelled by the requirements that each two-member board contain one representative of the general public and that the failure of a two-member panel to reach a decision engenders the appointment of a third panel member from an interest group not already represented on the panel. Thus, use of the two-member interest-designated panels does not violate the procedural due process rights of litigants in workers' compensation appeals.

Affirmed.

Justice Brickley, joined by Justice Levin, concurring in the result, stated that while the concept of interest-group representation and the interest-group imbalance of the Workers' Compensation Appeal Board are not questionable in a constitutional sense, the fact that the defendant, unlike other similarly situated employers, found himself before a panel composed so as to place him at a disadvantage is unfair. It is not the weighting of the panel, but the irrational

manner in which the defendant was singled out for a less favorable and receptive panel than others similarly situated that raises a constitutional question. However, in this case the defendant did not raise an equal protection challenge, and no question of due process bias is present.

Chief Justice Riley, joined by Justice Griffin, dissenting, stated that, while representative designations of Workers' Compensation Appeal Board members do not create agency relationships between the members and the interest groups represented, the interest designations reflect the knowledge, experience, interest, and alignment of the board members with the particular groups. Although a member of one interest designation can judge the merits of a case brought by a member of the other interest group, it is clear that a board member will use past experience and alignments in reaching a decision, and this may tip the balance in some cases in favor of the board member's interest designation. When a panel is not balanced, due process is violated. Since representatives are, by definition, aligned and identified with the interests of members of their interest groups who appear before the board, in order to reduce the risk of prejudice, a two-member panel should be composed of either one employee and one employer representative or two general-public representatives.

(Filed June 9, 1988)

Michigan Supreme Court
Lansing, Michigan 48909

Chief Justice
Dorothy Comstock Riley

Associate Justices
Charles L. Levin
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dennis W. Archer
Robert P. Griffin

OPINION

12/October 1987

No. 79949

ROBERT WILLIAMS
Plaintiff-Appellee,

v

HOFLEY MANUFACTURING COMPANY,
Defendant-Appellant.

BEFORE THE ENTIRE BENCH

BOYLE, J.

We are asked in this appeal to consider a procedural due process challenge to the constitutionality of two-member, interest-designated panels of Michigan's Workers' Compensation Appeal Board as provided in 1985 PA 103,

§ 261, MCL 418.261; MSA 17.237(261).[1] We conclude that use of these designated panels does not violate the Due Process Clauses of US Const, Am XIV and Const 1963, art 1, § 17. We therefore affirm the decision of the appeal board's award of benefits to the plaintiff in this matter.

I

The plaintiff was employed by the defendant from the period of August 31, 1978, until March 19, 1980. On June 26, 1980, he filed a petition for hearing with the Bureau of Workers' Disability Compensation, alleging an injury to his right arm, an injury to his lower back, and aggravation of a nervous condition. By order of the bureau dated July 31, 1981, the plaintiff was awarded a closed period of disability benefits commencing on his last day of work and ending on November 25, 1980.

The defendant appealed the decision of the bureau, contesting the bureau's findings regarding a personal injury, the date of injury, and the effect of defendant's May 16, 1980, offer of favored work.[2] The appeal board affirmed

---

1. Although Justice Brickley has expressed his view as to the constitutionality of this statute under the Equal Protection Clause of Const 1963, art 1, § 2, and US Const, Am XIV, no such issue has been raised, preserved, or briefed by the parties. As we have previously held, constitutional issues not raised or briefed below will not be addressed by this Court. *Butcher* v *Dep't of Treasury*, 425 Mich 262, 276; 389 NW2d 412 (1986). The *Butcher* plaintiff's subsequent appeal to the United States Supreme Court also was dismissed for want of a properly presented federal question. ..... US .....; 107 S Ct 864; 93 L Ed 2d 821 (1987). Indeed, in our view, the *Butcher* appellants presented a much better argument for preservation, since they had at least raised/briefed their equal protection issue in this Court.

2. The bureau made no specific finding regarding favored work, but by implication found that the plaintiff's refusal was reasonable. See, generally, *Bower* v *Whitehall Leather Co*, 412 Mich 172; 312 NW2d 640 (1981).

in an opinion and order dated September 8, 1986. The board's opinion was written by member Sheila H. Hughes, a designated representative of the general public. Board member Ramona L. Fernandez, a designated representative of employee interests, concurred in the opinion.

The defendant applied for leave to appeal in the Court of Appeals, arguing that the two-member appeal board panel was unconstitutional, that the appeal board had erred as a matter of law in finding a work-related personal injury, and in failing to suspend the plaintiff's benefits for his refusal of favored work. The Court of Appeals denied leave to appeal in an order dated November 26, 1986. Plaintiff subsequently applied for leave to appeal in this Court and, in an order dated June 30, 1987, we granted leave, limited to the issue whether the defendant was denied due process of law because of the composition of the two-member appeal board panel.[3]

II

At the time of its inception in 1912, the Industrial Accident Board, predecessor of the current WCAB, was composed of only three members who sat as a single appeal panel.[4] The Industrial Accident Board members were not

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3. In *Williams* v *Chrysler Corp*, 159 Mich App 8; 406 NW2d 222 (1987), the Court of Appeals held that the use of a two-member appeal board panel consisting of one employee representative and one representative of the general public was a violation of the defendant-employer's right to procedural due process. Since the operative facts of that opinion and this opinion are identical, we necessarily reach the same issue. However, we expressly decline to reach the issue suggested by Judge Cynar in dissent: Whether the third panel member's "controlling" decision, in the event that a two-member panel cannot reach a decision, would violate the litigant's right to procedural due process. The issue was not actually presented in *Williams* v *Chrysler Corp*, nor is it presented in this appeal.

4. 1912 (1st Ex Sess) PA 10, part 3.

designated by interest group, although the act specified that no more than two members of the board could belong to the same political party.[5] 1947 PA 357 abolished the Industrial Accident Board and created a four-member Workmen's Compensation Commission.[6] The commission continued to sit as a single appeal panel. Its members were not designated by interest group, and the party qualification provision of the Industrial Accident Board was deleted.[7]

1955 PA 62 abolished the commission and created a three-member Workmen's Compensation Appeal Board.[8] Board members were not designated by interest group or party. The appeal board continued to review the decisions of the hearing referees as a single panel.[9]

1965 PA 139 expanded the appeal board to seven members[10] and divided the board into rotating four-member hearing panels.[11] Under the 1965 amendment, board members' panel assignments were alternated so that members served with each other on a substantially equal basis. Again, board members were not designated by interest group or party affiliation. 1973 PA 73 further expanded the appeal board to eleven members, with five-member hearing panels, but the procedure was otherwise unchanged.[12]

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5. 1912 (1st Ex Sess) PA 10, part 3, § 1.
6. 1947 PA 357, ch I, § 1.
7. 1947 PA 357, ch I, §§ 1, 6.
8. 1955 PA 62, § 9.
9. 1955 PA 62, § 11.
10. 1965 PA 139, § 9.
11. 1965 PA 139, § 11.
12. 1973 PA 73, §§ 251, 261(2).

1978 PA 456 further expanded the appeal board to fifteen members and, for the first time, required appeal board members to be appointed from designated employer, employee, and general public interest groups.[13] Hearing panels were reduced to three members, although panel members continued to be alternated without regard to their interest designation. *Id.* This procedure necessarily resulted in some hearing panels which were comprised solely of members of one designated interest group. It also spawned several constitutional challenges on due process grounds.[14] The statute was amended again in 1980 to require that the three-member hearing panels be comprised of one member from each of the employee, employer, and general public interest groups.[15]

1985 PA 103 contains the most recent amendment of appeal board procedure and the statutory provision challenged by the defendant. 1985 PA 103 provides in pertinent part:

> "Except as otherwise provided for in this act, a matter pending review before the appeal board shall be assigned to a panel of 2 members of the board for disposition, with each panel comprised of 1 member each from the employee and employer representatives, the employee and general public representa-

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13. 1978 PA 456, § 251.

14. *Pitoniak* v *Borman's Inc*, 104 Mich App 718; 305 NW2d 305 (1981), lv den 411 Mich 1049 (1981) (constitutional); *Warren* v *Motor Wheel Corp*, 110 Mich App 731; 313 NW2d 286 (1981), lv den 411 Mich 1049 (1981) (constitutional); *Vayiar* v *Vic Tanny Int'l*, 114 Mich App 388; 319 NW2d 338 (1982) (unconstitutional); *Ratliff* v *General Motors Corp*, 127 Mich App 410; 339 NW2d 196 (1983), lv den 419 Mich 932 (1984) (constitutional).

15. 1980 PA 357, § 261(2).

tives, the employer and general public representatives, or 2 members representative of the general public. The decision reached by the assigned members of a panel shall be the final decision of the board. If the members of a panel cannot reach a decision, the chairperson of the board shall assign a third panel member to review the matter. The third member shall be from a designated representative group that is not already represented on the panel, except for a panel of 2 members representative of the general public in which case the third member shall be a representative of the general public. The decision of the third member shall be controlling and shall be considered to be the final decision of the board." MCL 418.261(2); MSA 17.237(261)(2).

The defendant argues that the "unbalanced" appeal board panels instituted by 1985 PA 103 created a risk of bias which deprived it of the right to procedural due process. It is well established, however, that the requirements of procedural due process are triggered only by the implication of protected property or liberty interests, *Bd of Regents of State Colleges* v *Roth*, 408 US 564, 569; 92 S Ct 2701; 33 L Ed 2d 548 (1972); *Perry* v *Sindermann*, 408 US 593, 599; 92 S Ct 2694; 33 L Ed 2d 570 (1972). It is only when a protected interest has been found that we may proceed to determine what process is due. *Logan* v *Zimmerman Brush Co*, 455 US 422, 428; 102 S Ct 1148; 71 L Ed 2d 265 (1982). Therefore, we must first consider what, if any, protected interest the defendant has in this litigation.

III

The applicability of procedural due process guarantees depends initially on the presence of a "property" or "liberty" interest within the meaning of the Fifth or Fourteenth Amendment. *Arnett* v *Kennedy*, 416 US 134, 165; 94 S Ct 1633; 40 L Ed 2d 15 (1974). However, as the United States Supreme Court has explained:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth, supra*, 577. See *Bundo* v *Walled Lake*, 395 Mich 679, 692; 238 NW2d 154 (1976).

We need not consider whether the process involved in this claim impinged upon any liberty interest, since we conclude that the defendant has a property interest in this litigation. It is beyond dispute that a money judgment rendered in this litigation against the defendant would deprive it of property. Moreover, the United

States Supreme Court has held that a cause of action is, in itself, a species of property protected by the Fourteenth Amendment's Due Process Clause. *Logan, supra,* p 428. *Mullane* v *Central Hanover Bank & Trust Co,* 339 US 306, 313; 70 S Ct 652; 94 L Ed 865 (1950). As the *Logan* Court explained:

> "This conclusion is hardly a novel one. The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. In *Societe Internationale* v *Rogers,* 357 US 197 [78 S Ct 1087; 2 L Ed 2d 1255] (1958), for example—where a plaintiff's claim had been dismissed for failure to comply with a trial court's order—the Court read the 'property' component of the Fifth Amendment's Due Process Clause to impose 'constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.' *Id.,* at 209. See also *Hammond Packing Co* v *Arkansas,* 212 US 322, 349-351 [29 S Ct 370; 53 L Ed 530] (1909) (power to enter default judgment); *Hovey* v *Elliott,* 167 US 409 [17 S Ct 841; 42 L Ed 215] (1897) (same); *Windsor* v *McVeigh,* 93 US 274 [23 L Ed 914] (1876) (same). Cf. *Wolff* v *McDonnell,* 418 US 539, 558 [94 S Ct 2963; 41 L Ed 2d 935] (1974). Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard

upon their claimed right[s].' *Boddie* v *Connecticut*, 401 US 371, 380 [91 S Ct 780; 28 L Ed 2d 113] (1971)." 455 US 429-430.

Thus, to the extent that the procedure involved in this litigation would affect the ability of the defendant to present a legitimate defense, the defendant's property rights are also impaired.[16]

IV

Before continuing with the analysis of the statute under US Const, Am XIV and Const 1963, art 1, § 17, we must first return to the statute itself to determine in what way it affects the defendant's property rights. It is ultimately the responsibility of this Court to interpret Michigan law. *Hortonville School Dist* v *Hortonville Ed Ass'n*, 426 US 482, 488; 96 S Ct 2308; 49 L Ed 2d 1 (1976).

Of pivotal importance in this case are the statutory requirements for the appointment and service of appeal board members. Our primary objective in reviewing the statutory requirements is, of course, to discover the legislative intent. *State Treasurer* v *Wilson*, 423 Mich 138, 143; 377 NW2d 703 (1985); *Hiltz* v *Phil's Quality Market*, 417 Mich 335, 343; 337 NW2d 237 (1983). In doing so, we bear in mind that every statute passed by the Legislature is presumed to be constitutional, and a reviewing court should find an act invalid only when there is no reasonable interpretation which will sustain it. *Wilson*,

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16. Indeed, it is our conviction that both parties have a property right in the litigation, although the plaintiff would not affirmatively be deprived of any other property as a result of an adverse judgment.

supra, p 146. *People* v *McQuillan*, 392 Mich 511, 536; 221 NW2d 569 (1974). Indeed, although the presumption is not conclusive, it is powerful enough to permit even a strained construction when necessary to save constitutionality. *Osborn* v *Charlevoix Circuit Judge*, 114 Mich 655, 660; 72 NW 982 (1897), *People* v *Bandy*, 35 Mich App 53, 57; 192 NW2d 115 (1971), lv den 386 Mich 753 (1971). 2A Sands, Sutherland, Statutory Construction, (4th ed) § 45.11, p 46.[17]

Section 251 of the act, MCL 418.251; MSA 17.237(251), specifies the criteria for the appointment and removal of board members. A majority must be attorneys in good standing of the State Bar of Michigan. Board members must devote their entire time to the duties of the board and may not engage in any other business or professional activity. Board members are appointed by the Governor, with the advice and consent of the Senate. A member of the appeal board may only be removed from office by the Governor for "good cause."[18] These criteria suggest that the legislative purpose was to create a board of independent stature, whose members would exercise professional judgment in hearing workers' compensation appeals.

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17. These principles of statutory interpretation are not addressed in the dissent of Chief Justice Riley.

18. "Good cause," as defined by statute, "shall include, but not be limited to, lack of productivity or other neglect of duties." MCL 418.251(1); MSA 17.237(251)(1). Although the issue is not raised in this appeal, the doctrine of *ejusdem generis* suggests that other examples of good cause would similarly be limited to examples of professional malfeasance and not the content of decisions. See *Poletown Council* v *Detroit*, 410 Mich 616, 635; 304 NW2d 455 (1981), 2A Sands, Sutherland, Statutory Construction (4th ed), §§ 47.18-47.19, pp 117-182.

The more difficult criterion for appointment is the representative status of board members. In this regard, the statute provides:

> "[O]f the board members, 5 shall be representative of employee interests in the state, 5 members shall be representative of employer interests of the state, and 5 members shall be representative of the general public." MCL 418.251(1); MSA 17.237(251)(1).

We acknowledge that the word "representative" is often used in a manner synonymous with "agent." However, the word is also frequently intended as a synonym for a "typical example or specimen." *The Random House College Dictionary* (rev ed). In the latter sense, board members would be "representative" of a particular interest group if they were typical professionals in the field employed or retained by the particular interest group. We note that the latter meaning of "representative" is more consistent with the adjectival use of the word in the statute. 2A Sands, Sutherland, Statutory Construction (4th ed), § 47.01, p 118. We further note that the latter interpretation of this word is more consistent with the other criteria for appointment or removal of board members which suggest intent to promote independent decision making. Thus, we do not interpret the representative nature of board members under the statute as the creation of a continuing agency relationship with a particular interest group, but as an attempt by the Legislature to develop a board which is fully reflective of the naturally divergent views in workers' disability compensation law.

Turning from the intrinsic to the extrinsic indicia of legislative purpose, we are again reminded that workers' compensation law in Michigan is the reconciliation of divergent economic interests. The act itself is the product of an historic compromise in which employers relinquished their common-law defense, employees sacrificed their right to full common-law damages, and both gained a system in which claims could be resolved in a more simplified, orderly, and assured manner.[19] The continued vitality of this compromise requires a continuing dialogue with representation of the interests of employee, employer, and the general public. This interest is promoted by drawing board members from these diverse interest groups.

In our view, representation of an agency sort does not follow inevitably or logically from a statutory requirement that a specified balance of board members be drawn as "representative" of particular interest groups. Advocacy is an inherent characteristic of the practice of law and specialization is inescapable in modern business. To condemn a nominee who is representative of a particular interest group is to foreclose experience as a criterion for appointment.

As Professor Kenneth Culp Davis has explained in his classic treatise on administrative law:

> "If . . . 'bias' and 'partiality' be defined to mean the total absence of preconceptions . . . then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions. . . . Every

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19. See *Crilly* v *Ballou*, 353 Mich 303, 308-309; 91 NW2d 493 (1958).

> habit constitutes a pre-judgment. . . . Interest, points of view, preferences, are the essence of living. . . . An 'open mind,' in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being, corresponding roughly to the psychiatrist's descriptions of the feeble-minded. . . . [E]very human society has a multitude of established attitudes . . . but many of them represent the community's most cherished values and ideals. . . . Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine. . . ." 3 Davis, Administrative Law (2d ed), § 19.3, pp 378-379, quoting *In re Linahan, Inc*, 138 F2d 650, 651 (CA 2, 1943).

These authorities are not cited in any attempt to foreclose the constitutional challenge raised by the defendant in this matter. They instead, we believe, provide a broader perspective for our construction of the statute. The word "representative" is, no less than any other expression of legislative purpose, symbolic.[20] 3A Sands, Sutherland, Statutory Construction (4th ed), p 171. We decline to give the word any talismanic powers, particularly on the basis of a definition which is grammatically awkard, analytically deviant, or constitutionally dubious. In our view, § 251 of the act, MCL 418.251; MSA 17.237(251), merely requires that board members be typical of the professionals active in various aspects of workers' compensation law. We do

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20. Of all words, it seems most likely that the Legislature would be cognizant that "representative" is subject to more than one interpretation.

not suggest that this typicality disappears once board members commence their duties. The gravamen of this due process challenge is the requirement of the succeeding § 261, MCL 418.261; MSA 17.237(261), that panel members be designated by interest group. We do observe that the statute requires no representation in the agency sense, and indeed, that such representation would appear to be in violation of the statutory duty of board members.[21] It is with this construction of the act that we return to the constitutional issue raised by the defendant.

V

As we have previously noted, the defendant argues that it was deprived of its right to due process of law as required by US Const, Am XIV and Const 1963, art 1, § 17 by the appeal board panel consisting of one employee representative and one representative of the general public. The defendant contends that this procedure contains a constitutionally impermissible level of bias resulting from three interests: 1) a pecuniary interest resulting from the limited, four-year terms of appeal board members, 2) a statutorily designated interest, and 3) a perceived interest.

Numerous opinions of the United States Supreme Court have held that biased decision making offends the constitutional right to procedural due process. See, e.g., *Tumey* v *Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927), *In re Murchison*, 349 US 133; 75 S Ct 623; 99 L Ed 942 (1955), *Ward* v *Village of Monroeville*, 409 US 57; 93 S Ct 80; 34 L Ed 2d 267 (1972), *Gibson* v *Berryhill*, 411 US 564; 93 S Ct 1689; 36 L Ed 2d 488 (1973), *Connally* v *Georgia*,

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21. Good cause for removal of board members, as noted above, includes neglect of duties. MCL 418.251(1); MSA 17.237(251)(1).

429 US 245; 97 S Ct 546; 50 L Ed 2d 444 (1977), and *Aetna Life Ins Co* v *Lavoie,* 475 US 813; 106 S Ct 1580; 89 L Ed 2d 823 (1986). This Court has similarly held that unbiased or impartial decision making is a basic requirement of due process. *Crampton* v *Dep't of State,* 395 Mich 347, 351; 235 NW2d 352 (1975), *Morris* v *Metriyakool,* 418 Mich 423, 432; 344 NW2d 736 (1984), and *Livonia* v *Dep't of Social Services,* 423 Mich 466, 508; 378 NW2d 402 (1985). The significance of this principle was explained by the United States Supreme Court as follows:

> "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. See *Carey* v *Piphus,* 435 US 247, 259-262, 266-267 [98 S Ct 1042; 55 L Ed 2d 252] (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See *Mathews* v *Eldridge,* 424 US 319, 344 [96 S Ct 893; 47 L Ed 2d 18] (1976). At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' *Joint Anti-Fascist Committee* v *McGrath,* 341 US 123, 172 [71 S Ct 624; 95 L Ed 817] (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed

to find against him." *Marshall* v *Jerrico*, 446 US 238, 242; 100 S Ct 1610; 64 L Ed 2d 182 (1980).

The right to due process of law by a neutral and detached decisionmaker is a most important constitutional right.[22] However, legal judgments are not made in the atmosphere of a bell jar, nor is the judicial mind nurtured on abstraction. Thus, as the United States Supreme Court explained in *Tumey*, and we noted in *Morris*:

> "All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Tumey, supra*, p 523. See also *Morris, supra*, p 437.

An abuse of discretion involves far more than a difference in judicial opinion, *Spalding* v *Spalding*, 355 Mich 382, 384; 94 NW2d 810 (1959), and we are not empowered to rework a legislative compromise merely because it falls short of the ideal. Due process is flexible and calls for such procedural protections as the particular situation demands. *Schweiker* v *McClure*, 456 US 188; 102 S Ct 1665; 72 L Ed 2d 1 (1982). Therefore, as we turn toward the examination of this defendant's due process challenge, we begin with the presumption that board members are unbiased, *Schweiker, supra*, 456 US 195, and proceed with an emphasis upon the particular sources of bias alleged.

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22. Some commentators have gone so far as to suggest that neutral decisionmaker may be both a necessary and *sufficient* requirement for satisfaction of procedural due process. See Redish & Marshall: *Adjudicatory independence and the values of procedural due process*, 95 Yale L J 455 (1986).

The defendant first alleges that the composition of this board, one employee representative and one representative of the general public, creates an impermissible level of bias because of the *pecuniary* interest of the employee representative.[23] The defendant points out that appeal board members are appointed for a fixed term of four years. See MCL 418.251(1); MSA 17.237(251)(1). The defendant argues that the failure of an appeal board member to act according to his designated interest would jeopardize the member's opportunity for reappointment. Thus, the defendant concludes, the employee representative's interest in a continuing salary has created a substantial risk of bias, tainting the appeal board's decision in this case.

It is beyond dispute that even an indirect pecuniary interest may deprive a decisionmaker of the impartiality essential to due process. *Tumey, supra,* p 523; *Ward, supra,* p 60; *Gibson, supra,* p 569. However, not every potential pecuniary interest is sufficient to render a decisionmaker impermissibly biased. The United States Supreme Court's opinion in *Schweiker* illustrates this point with facts closely analogous to those of the instant case.

In *Schweiker,* three Medicare recipients raised a due process challenge attacking the impartiality of the hearing officers employed by the private carriers who administer the program under contract with the federal government. The *Schweiker* Court observed that the salaries of the hearing officers, as well as the claims of the insureds, were paid by the federal government. A unanimous

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23. It has not escaped our notice that no pecuniary interest on the part of the general public representative is alleged, although we would momentarily defer our analysis of the effect this may have on the decisional process.

Court in *Schweiker* rejected the allegation of a pecuniary bias, while acknowledging that most of the hearing officers were former employees of the carrier, that their appointments as hearing officers were at the discretion of the carrier, and that their continued service was at the will of the carriers.

Considerably more independence is exercised by workers' compensation appeal board members under the current Michigan law. While it is likely that many employer representatives will be drawn from the ranks of carriers or self-insureds, they are not obliged to continue their service while hearing appeals. Indeed, as discussed in part IV, board members are *forbidden* by statute from engaging in any other business or professional activity and must devote their entire time to personally performing the duties of their office. Moreover, appeal board members are not employees at will, but may only be removed for cause.

To conclude that board members have a pecuniary bias is to assume not only that board members will ignore their statutory responsibilities because of past associations with particular interest groups, but also that board members will value their future employment with the board above fair and impartial decision making. We can accept neither of these assumptions. First, we find persuasive the *Schweiker* Court's observation that "The fact that a hearing officer is or was a carrier employee does not create a risk of partiality analogous to that possibly arising from the professional relationship between a judge and former partner or associate." *Id.*, p 197, n 11. Second, there can be no interest in future employment as an interest group representative under this statute. Effective July 1, 1989, the appeal board

is abolished. MCL 418.266; MSA 17.237(266). As of that date, all cases pending before the appeal board which have not yet been reviewed must be transferred to the newly created appellate commission. MCL 418.266 (3); MSA 17.237(266)(3). The appellate commissioners are not appointed according to interest designation, MCL 418.274; MSA 17.237(274), and any interim appointee to the appeal board must be a designated representative of the general public. MCL 418.251(2); MSA 17.237(251) (2). Therefore, whatever attenuated pecuniary interest that may have existed in reappointment no longer exists in appeal board members.

Our construction of the statutory provisions for appointment, service, and removal of board members requires that we also reject the defendant's allegation of a statutorily designated interest. We find nothing in the statute which requires a continuing advocacy of the representative's interest group, much less the requirement that board members are bound to decide cases on the basis of the views of the interest group from which they emerge.

Finally, we must reject the defendant's contention that the statute is rendered unconstitutional by the mere perception of bias. We believe that the perception of fairness *is* important to the function of a democratic society, and we are mindful of the United States Supreme Court's admonishment that "To perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison, supra,* p 136, quoting *Offutt* v *United States,* 348 US 11, 14; 75 S Ct 11; 99 L Ed 11 (1954). However, the perception upon which the defendant bases its argument is in turn based upon an erroneous construction of the statute in which board members are continuing advocates of the interest group from which they are drawn.

We decline to equate a perception of this sort with the reality of the statute we have so carefully examined. To do so would be to ignore not only the purpose of the Legislature in this distance, but also the role of the Legislature in our constitutional system. *Murchison* does not require such a result, and we believe that adoption of the foreshortened methodology urged by the defendant actually runs contrary to the spirit of order and fairness embodied in the Due Process Clauses of US Const, Am XIV and Const 1963, art 1, § 17. *Marshall, supra,* p 242.

Properly perceived, §§ 251 and 261 of the Workers' Disability Compensation Act draw upon the expertise of persons employed among the various interest groups in Michigan's workers' compensation system in order to create a competent and representative board. The past affiliations of individual board members do not bind their decisions during their tenure as board members. Moreover, the statute is carefully drawn so that a general public representative provides a check upon the decision of either an employer or an employee representative. The presence of a clearly neutral party on each of the two-member panels should completely dispel any perception of bias in this decision-making process. If we assume,[24] contrary to established law,[25] that an employee representative is somehow constrained to decide in favor of an employee, it would be logical to assume that employer representatives are equally bound and that the creation of a split decision by the general public representative would guarantee a decision favorable to the employer. Thus, to the extent

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24. No evidence has been presented in this case indicating that there is actual bias on the part of individual board members.

25. *Schweiker, supra,* p 195.

that employer or employee representatives are perceived as biased, the decision of the general public representative must be perceived as controlling.[26] In our view, a thoughtful perception of the statute should lead to the conclusion that the scheme employed by the Michigan Legislature is designed to promote balanced, impartial decision making.

We have therefore rejected each of the defendant's assertions of bias in the context of the two-member, interest-designated Workers' Compensation Appeal Board. We conclude the scheme employed by the Legislature in this instance is fully protective of the rights of the litigants in workers' disability compensation under US Const, Am XIV and Const 1963, art 1, § 17.[27]

Conclusion

Litigants in workers' compensation proceedings under Michigan law have a cognizable property interest in their claims under US Const, Am XIV. However, the use of two-member, interest-designated panels, as set forth in 1985 PA 103, MCL 418.261; MSA 17.237(261), does not bind the decisions of board members, but merely insures that

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26. In *Aetna Life Ins Co* v *LaVoie, supra,* the United States Supreme Court declined to consider whether a decision need be vacated when a disqualified judge's decision is mere surplusage. We also decline to consider this question, since we have previously concluded that an employer representative is not disqualified by bias. Our discussion touches on the issue only in the context of the *perception* of bias.

27. A different question might be presented were it to appear that the practical construction of the statute, as reflected in the opinions of the WCAB or otherwise, his been that the employer and employee members of the WCAB do indeed regard themselves as advocates and not as impartial decisionmakers.

Because constitutional questions are beyond the purview of the WCAB, such a showing can probably only be made in an action for declaratory judgment.

the membership of the board is drawn from and representative of the diverse economic interests involved in workers' compensation law. The statutory requirements for the continuing service or removal of board members ensures that there is no pecuniary interest of board members in the cases they adjudicate. Furthermore, even the perception of bias is dispelled by the requirements that each two-member board contain one representative of the general public and that the failure of the two-member panel to reach a decision triggers the appointment of a third panel member from an interest group not already represented on the panel.

We therefore conclude that the statute does not violate the procedural due process rights of litigants in these proceedings under US Const, Am XIV or Const 1963, art 1, § 17. The decision of the Workers' Compensation Appeal Board is therefore affirmed.

/s/ Patricia J. Boyle

/s/ Dennis W. Archer

/s/ Michael F. Cavanagh

/s/ Charles L. Levin

12/October 1987

STATE OF MICHIGAN
SUPREME COURT

No. 79949

ROBERT WILLIAMS,
Plaintiff-Appellee,

v

HOFLEY MANUFACTURING COMPANY,
Defendant-Appellant.

BRICKLEY, J. (*concurring*).

I

As the majority aptly points out, personal bias and predilection lives within all of us to one degree or another. Those who exercise judicial or quasi-judicial duties are no exception. We nontheless, in our objective of achieving as much fairness as possible, build procedures and systems that are designed to minimize the effects of such shortcomings. The most obvious kinds of bias that rise to constitutional infirmity are those that arise when decision making also affects personal interests. See, e.g., *Connally* v *Georgia*, 429 US 245; 97 S Ct 546; 50 L Ed 2d 444 (1977). These are the easiest to identify, and also the easiest to avoid by procedures for disqualification and the like.

There are more subtle biases and interests that are more difficult to identify or to remove from the system. An example is one of the claims made by the defendant in this case when it suggests that the appeal board members

are biased because, if they deviate from their economic interest identification, they will threaten their reappointment. Such an interest is of course almost always present to one degree or another for any decisionmaker in any branch of government who is subject to appointment or election. This type of interest is endemic to a democratic system, and for that reason is within tolerable constitutional limits.

Not to be confused with bias are philosophical views and value judgments that also reside within all of us that do not normally disqualify a person from rendering a fair decision, even though they influence the decisionmaker and the decision. The electorate or appointing authorities can and do elect and appoint persons of the same or divergent economic and social backgrounds and views. Boards and commissions may not discriminate or exercise bias, but they may exercise economic and social preferences in the formulation of their policies and decisions, particularly where such preferences are a part of the legislative scheme.

Workers' compensation and the systems and procedures for its implementation are examples of this. It would not necessarily be unconstitutional for the Legislature, as a matter of policy, to choose to weigh decision making in favor of either employee or employer interests where it is rationally related to a legitimate government purpose. Decisions regarding how to organize a quasi-administrative body are essentially the product of the political process. However, the constitutionality of a consistently weighted procedure is not the question before us. Instead, we have before us a system that on its face is intended to give equal weight to the employee and employer interests but, at the same time, not only allows, but specifically provides, that similarly situated parties within an interest class are occasionally and randomly subjected to a different

balance than others. Again, it is not the balance or the imbalance, as such, with which we should be concerned; rather, it is that the balance is shifted for some litigants. This, if anything, raises equal protection concerns in light of the fact that the change in balance is completely random and apparently without a rational basis.[1]

II

The majority posits that the board members are not biased out of personal interests, and I agree. However, the majority reaches two further conclusions with which I do not agree. First, it concludes that board members do not represent an ongoing economic interest. Second, the majority holds that even if board members are representative of a particular interest the fact that a public member is always a member of a two-person panel cures the problem, since the worst that could happen is a tie vote which would be ultimately broken by a member of the interest that was not on the two-member panel.

A

The majority reads § 251, which is at issue in this case, as only indicating the background from which an appointee should come, not as to how the appointee shall carry out required duties. Section 251 is as follows:

> "Sec. 251. A worker's compensation appeal board is created, referred to in this act as the board. Except

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1. *Higgins* v *Monroe Evening News*, 404 Mich 1, 26; 272 NW2d 537 (1978) (Kavanagh, C. J., dissenting) (" 'Legislation is invalid on equal protection grounds if it creates classifications which are without reasonable bases and are purely arbitrary,' " quoting *Higgins* v *Monroe Evening News*, 70 Mich App 407, 418; 245 NW2d 769 [1976]).

as provided for in subsection (2), the board shall consist of 15 members, a majority of whom shall be attorneys at law who are members in good standing of the state bar of Michigan. Except as provided for in subsection (2), of the board members, 5 shall be representative of employee interests in the state, 5 members shall be representative of employer interests of the state, and 5 members shall be representative of the general public. A member of the board shall devote his or her entire time to and personally perform the duties of the office and shall not engage in other business or professional activity. The governor, with the advice and consent of the senate, shall appoint the members for a term of 4 years, and until their successors are appointed and qualified. A vacancy shall be filled for an unexpired term in the same manner as the original appointment. The governor shall designate the chairperson of the board from among the members to serve at the pleasure of the governor. A member of the appeal board may be removed by the governor for good cause. Good cause for removal shall include, but not be limited to, lack of productivity or other neglect of duties."

Section 251 does not provide, as the majority suggests, that board members are to be appointed from a specific group, but that they then must act as purely neutral decisionmakers. Instead, the provision states that "of the board members, 5 shall *be* representative of . . . ." It is hard to believe that a newly appointed board member reading this provision of the statute would not conclude the interest to "be representative of" is the interest of those who nominated the member or the interest in-

dicated in the appointment documents forwarded to the Senate.

If there is any doubt about the intention of the Legislature, or the understanding or expectation of the appointee, it is resolved by reading § 261 which provides that two members of the same representation designation cannot sit together on a two-person panel. What clearer public policy indication could there be that they are expected to vote from the point of view of a particular economic interest.

For these reasons, I would conclude that the board members are expected to represent a particular point of view. While the majority concludes that it would be neglect of duty for a panel member to act as an agent of an interest group,[2] the language of the statute makes equally plausible the view that a failure to "represent" the points of view of the appointee's interest group would also constitute a neglect of duty.

B

The majority suggests for the sake of argument that even if there is ongoing representational interests on the part of the board members, it is sufficiently diluted under the scheme of § 261 because the vote of a representative of either the employer or employee interest that is adverse to a litigant of the opposite interests would be checked by the vote of the public member, thus resulting in a tie and bringing in the missing interest. I am not persuaded by this argument. Those of us who serve on multiple-person tribunals are aware of the dynamics of this kind

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2. Slip opinion, p 13, n 19.

of decision making and the influence that can be exercised by those who are present when the decision is made. As Justice Brennan stated in discussing the concerns raised where one member of a multimember court is biased,

> "[T]he description of an opinion as being 'for the court' connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition." *Aetna Life Ins Co* v *Lavoie*, 475 US 813, 831; 106 S Ct 1580; 89 L Ed 2d 823 (1986) (Brennan, J., concurring).

I cannot agree that an employer litigant who appears before a panel made up of a general public representative and an employee representative is, because of the presence of the general public member, not treated differently than most other litigants or that this difference in treatment has a rational basis.

CONCLUSION

Despite my disagreement on these points I would not necessarily find questionable in a constitutional sense in either the concept of interest-group representation or interest-group imbalance of the Workers' Compensation

Appeal Board. What I do find unfair is the fact that other employers situated similarly to the defendant in every respect would have found themselves before a two-member panel comprised either of one employer representative and one representative of the general public, one employee representative and one employer representative, or two representatives of the general public. By random selection, this defendant finds himself before the only panel composition that places him at a disadvantage more than other litigants similarly situated.

It is not in my view the weighting of this panel itself, but the irrational manner in which this litigant has been singled out for a less favorable and receptive panel than others similarly situated that raises a constitutional question. However, since this would amount to an equal protection challenge and since the defendant raises only a due process bias question which I do not find to be present here, I join the result of the majority.[3]

/s/ James F. Brickley

/s/ Charles L. Levin

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3. For preservation of constitutional issues see *Butcher* v *Dep't of Treasury*, 425 Mich 262, 276; 389 NW2d 412 (1986).

12/October 1987

STATE OF MICHIGAN
SUPREME COURT

No. 79949

ROBERT WILLIAMS,
Plaintiff-Appellee,

v

HOFLEY MANUFACTURING COMPANY,
Defendant-Appellant.

RILEY, C.J. (*dissenting*).

The foundation of the majority opinion is a rather limited view of the purpose underlying representative designations of Workers' Compensation Appeal Board members. The majority finds that interest designations do not require an agency relationship between board members and their constituency, but are designed to insure a board which reflects members who are "typical of the professionals active in various aspects of workers' compensation law." Slip op, p 13. Thus, the majority concludes that the interest designations are intended to provide only a diversity of viewpoints and experience among board members. Slip op, pp 11, 13.

I agree with the majority that a board member's designation does not create an agency relationship between the member and the interest group represented. If that were the case, the board member would be required to act in all circumstances in such a manner as to further the interests of their constituency. Of course,

that is not the case as board members are not bound by their interest designations and, in fact, often vote contrary to their specific designation.

By focusing on, and overstating, what the interest designation is not—an agency relationship—the majority obscures what the designation does reflect—knowledge, experience, interest, and alignment with the particular group being represented. This is not to imply that members of one interest designation cannot judge the merits of a case brought by a member of the other interest group. However, in so judging, it is clear that a board member will use past experience and alignments in reaching a decision regarding a case. Therefore, it is fair to conclude that a board member's knowledge and experience may tip the balance in some cases and that that slant will be in favor of the board member's interest designation.

As a result, even if I agreed with the majority regarding the limited nature of a board member's representational interest, which I do not,[1] I would find a due

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1. That the Legislature intended a stronger representational relationship than that expressed by the majority is indicated by the legislative history of the workers' compensation act which evidences that the Legislature regards unbalanced panels to be unfair. Prior to 1980, hearing panels were assigned randomly without taking into account interest designations of the members, the result of which was that some panels were comprised of a majority of members of either particular interest group (though not necessarily solely of members of one interest designation, as stated by the majority. See slip op, p 5). These unbalanced panels resulted in several constitutional challenges. See slip op, p 5, n 13. However, in 1980, the Legislature amended the act to require that the panels include one member from each interest designation. 1980 PA 357, § 261(2). The majority notes this revision, slip op, p 5, then blithely proceeds to ignore the obvious implication—that being a legislative acknowledgment that unbalanced panels are not particularly fair.

process violation where the panel is not balanced. In *Vayiar* v *Vic Tanny Int'l,* 114 Mich App 388, 392; 313 NW2d 286 (1982), the Court held that due process is violated where "a majority of a decision-making panel is strongly identified and aligned with one of the parties (but not the other). . . ." Thus, the Court decided that a three-member WCAB panel (under the former act) comprised of two employee representatives and one employer representative was violative of due process. Because employee representatives are, *"by definition,* identified and aligned with the interests of employees who appear before the Workers' Compensation Appeal Board" the defendant employer was denied an impartial decision-maker. *Id.* at 392.

The *Vayiar* Court was influenced by the fact that providing an alternative procedure—one member from each interest designation—would impose no greater fiscal or administrative burden on the state:

> "Where an alternative procedure posing a much smaller risk of prejudice by a decision-maker will impose no greater administrative burden on the state, it should not be necessary to prove that erroneous deprivations are likely under the present procedure, but only that the present procedure poses a substantial risk of bias in the decision-maker. We find that the defendants have made such a showing; consequently, they are entitled to a new hearing before the Workers' Compensation Appeal Board." *Id.* at 393.

The Court in *Williams* v *Chrysler Corp,* 159 Mich App 8; 406 NW2d 222 (1987), addressed a due process challenge to a panel comprised precisely the same as

the panel in this case. The *Williams* Court recognized that *Vayiar* was somewhat factually distinguishable but that the rationale underlying *Vayiar* applied. *Id.* at 19.

> "[W]e agree that employee representatives are, by definition, aligned and identified with employee interests. . . . [W]e hold that, even though the employee representative does not constitute a majority of the WCAB panel but, in fact, is only one-half of it, Chrysler was nonetheless denied its right to a fair and impartial hearing because it must be presumed that the employee representative was already aligned with plaintiff's position. We believe that the fact that an employer representative would be added to the panel in the event of a tie vote between one member already aligned with plaintiff and a neutral member is insufficient to overcome the initial partiality inherent in the original two-member WCAB panel. We further note that it would impose no greater financial burden on the state to provide an alternative decision-making procedure which would greatly reduce the risk of prejudice: namely, providing for two-member panels composed of either one employee and one employer representative or two general-public representatives. . . . In either case, a split may be resolved by a general-public representative." *Id.*

I agree with the decision in *Williams*. I would vacate the opinion of the WCAB and remand this case to be decided by a WCAB panel comprised of one employee and one employer representative or two general public representatives.

/s/ Dorothy Comstock Riley
/s/ Robert Griffin

APPENDIX B

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 24th day of November in the year of our Lord one thousand nine hundred and eighty six

Present the Honorable
Robert J. Danhof, C.J.
Presiding Judge
Walter P. Cynar
John H. Shepherd
Judges

No. 95770

WCAB No. 245

ROBERT WILLIAMS,
Plaintiff-Appellee,

-v-

HOFLEY MANUFACTURING COMPANY,
Defendant-Appellant.

In this cause an application for leave to appeal is filed by defendant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

It is ordered that the application be, and the same is hereby denied for lack of merit in the grounds presented.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 26th day of November in the year of our Lord one thousand nine hundred and eighty six

/s/ Ronald L. Dzierbicki
Chief Clerk

APPENDIX C

DEC. # 245

STATE OF MICHIGAN
WORKERS' COMPENSATION APPEAL BOARD

ROBERT WILLIAMS,
SS 379 80 9355,
PLAINTIFF,

VS.

HOFLEY MANUFACTURING COMPANY,
DEFENDANT.

APPEAL FROM THE ADMINISTRATIVE
LAW JUDGE CHISHOLM

DECISION ON REVIEW

HUGHES, MEMBER OF THE APPEAL BOARD

Defendant Hofley Manufacturing Company appeals the decision of Administrative Law Judge Allan D. Chisholm that plaintiff, Robert Williams, received a personal injury arising out of and in the course of his employment on March 19, 1980, and was disabled until November 25, 1980. Plaintiff has not appealed the closed period. Wages were stipulated to be $315, including fringe benefits. There were no dependents. We affirm the closed period.

Plaintiff, twenty-one years old, began working for defendant August 31, 1978. Approximately one year later, on September 4, 1979, he attempted to move a tub of steel weighing about 300 pounds and felt pain in his right arm.

Compensation was paid for two weeks. He returned to light work for a couple of months thereafter, returning to his regular work until March 19, 1980. On that date, he attempted to move a large tub of steel parts, and felt a sharp pain in his lower back. He collapsed on the floor. An ambulance was called. Plaintiff was put on a stretcher and transported to Bi-County Orthopedic Hospital, where he received four injections in his back, and then Demerol every two hours. He was hospitalized for about thirty-six hours. He was released from the hospital with prescriptions. About two weeks later, plaintiff saw Dr. Watts. For the next six or seven weeks, he treated with Dr. Watts, and saw Dr. Barnett, his family doctor, an additional two or three times. An appointment was made for plaintiff to see a company doctor a few days after his release, but plaintiff alleged he was unable to leave his bed.

Plaintiff never returned to work, although he was offered a sit-down job on May 16, 1980. Plaintiff stated he could not return because he was in severe pain, and the medication he was on: Placidyl, Tylenol #4, Fiorinal #4, and Talwin, did not permit him to do even light work around moving machinery. He feared losing a finger in a press due to the side effects of the medication: dizziness, and confusion. He stated that the codeine in the drugs also caused nausea and rashes. Due to the side effects, plaintiff stopped taking the medication when he finished his prescriptions. He did not attempt to return to work for defendant when he went off medication because he had been advised that the offered jobs were available only for a limited period.

In June of 1980, plaintiff was again hospitalized overnight at Bi-county Hospital for treatment of back pain he suffered while bending over away from work. He was

treated with muscle relaxants and released with prescriptions. He had very sharp pains above the belt line for about a year thereafter.

Plaintiff did participate in a strike at defendant's plant, although he stated he was too ill to return to work at that time. He stated he was told he would receive $45.00 weekly for his strike activities. This was his only source of income. He stated all he was required to do to collect benefits was to sit by a bonfire with the other men.

Plaintiff did admit that on July 3, 1980, during the strike, there was a big fight at the plant, resulting in plaintiff's incarceration for approximately 40 days on the misdemeanor charge of malicious destruction of property under $100.

Patrick W. Hudgins and Richard Nemitz testified that they were security guards on "strike detail during the Hofley strike" on July 2nd or 3rd, 1980. They observed plaintiff throwing something through defendant's office window. Mr. Hofley stated one of the things was a chunk of concrete weighing approximately 40 pounds.

Harold Jarvis, Industrial Relations Director for defendant, testified plaintiff was not a good employee before he was injured. Mr. Jarvis stated that he saw plaintiff when plaintiff fell (March 19, 1980), and plaintiff "had his arms behind his head and was grinning." Mr. Jarvis indicated later in his testimony that "he was not contending that the injury never occurred." Mr. Jarvis was present when the ambulance was called. Mr. Jarvis testified he subsequently had several conversations with plaintiff, offering plaintiff a sit-down job. Mr. Jarvis stated plaintiff refused the job, claiming to be physically unable to do any work, but that plaintiff never advised him that the side

effects of the medication precluded him from work. The offered job is not detailed in the transcript, nor in defendant's letter, except as a job allowing for sitting and standing. The record is devoid of any accurate description of the duties required.

Plaintiff was examined on April 24, 1980, a few weeks after his second injury, by Larry L. Blau, D.O., who limits his practice to Industrial Medicine. Dr. Blau found the straight leg raising test to be positive bilaterally for low back discomfort at 70°. He also found some discrepancy with plaintiff's willingness or ability to forward flex between the standing and seated positions. Dr. Blau found plaintiff's symptoms to be "somewhat of an enigma."

Bruce Tetalman, M.D., examined plaintiff on May 2, 1980, and November 25, 1980. On May 2, 1980, he found the plaintiff's deep tendon reflexes normal, active, and symmetrical. Straight leg raising caused pain in the lower back, but was negative. Manual muscle testing was normal, but caused referred pain to the back. The range of motion of the lumbar spine was decreased in all planes of motion and there were palpable muscle spasms on the left side of the lumbar spine. Girth of the calf was 15" on the right and 14" on the left. Girth of the thigh was 19" on the right and 13 3/4" on the left. Dr. Tetalman found plaintiff suffering from mild muscle spasm and muscle sprain of the lumbar paraspinal musculature. He was of the opinion plaintiff could work in a sedentary job with occasional bending, stooping and standing. He recommended 4-6 weeks of diathermy and ultra-sound combined with anti-inflammatory, and, possibly, pain medication.

Upon re-examination, November 25, 1980, Dr. Tetalman found forward flexion limited to 30°, and low back pain upon forward flexion. He found no muscle spasm,

but, ". . . a slight bizarreness to the patient's history and physical", and pain which Dr. Tetalman felt was an "inorganic pattern". He also found plaintiff had left-sided pain upon bending to the right and right sided pain upon bending to the left. Dr. Tetalman stated:

> "The patient appears to no longer have any soft tissue injury except on extreme motion which should not prohibit the patient from work." He felt this probably represented "a mild soft-tissue injury."

Vincent Gallant, M.D., board certified surgeon, examined plaintiff on November 6, 1980. He found straight leg raising to be negative and full range of motion in all of the joints without limitation or complaints of pain. Dr. Gallant testified:

> "I do not feel that this man has any significant disabling back condition. However, in view of his complaints of a persistent, dull aching pain in the midlumbar region I would permit this man to return to work with certain restrictions in that he be restricted from doing any heavy lifting or pushing of heavy loads."

Dr. Gallant noted the left leg atrophy, also found by Dr. Tetalman. He recommended that plaintiff have an EMG to try to account for the atrophy and plaintiff's complaints of pain, however, no EMG was done.

Joel Dreyer, M.D., psychiatrist, gave plaintiff a psychiatric examination on January 28, 1981. Dr. Dreyer found plaintiff to have a "long-standing character disordered oral personality . . ." Joel Dreyer was of the opinion that plaintiff's job-related problems caused him to drink heavily and become angry and violently upset.

Dr. Dreyer found: "marked reaction of adjustment to the situation." Dr. Dreyer was of the opinion that, psychiatrically, there was no way plaintiff could "function in the system" unless there was a written apology "and a total relationship" between plaintiff, the union, and management. Dr. Dreyer was of the opinion plaintiff deserved an apology because he believed plaintiff had not broken any windows and had been "framed" by the union and management in the alleged rock-throwing incident.

Gordon Forrer, M.D., psychiatrist, examined plaintiff on March 11, 1981. Dr. Forrer noted plaintiff seemed to have some difficulty and discomfort with both arising from, and seating himself in, the easy chair. Dr. Forrer found plaintiff to be hyperactive, "bordering on the hypomanic," but fully capable of working, from a psychiatric point of view.

As of the date of hearing, July 31, 1981, plaintiff complained of stiffness and spasm in his back, particularly in the morning. At the time of hearing, plaintiff was not under a doctor's care, nor was he taking any medication. Plaintiff began full time work for Technical Industries, approximately July 1, 1981, earning $4.25 hourly. This work, processing microfilm, was much lighter than his regular job for defendant which was picking up 75-80 pound bumpers, putting them into presses, and putting them on a big rack.

ANALYSIS

In assessing Dr. Dreyer's opinion, we must take into account that plaintiff pled guilty to charges of malicious destruction of property under $100.00, and was "dis-

charged with an assault charge for throwing beer on one of the foremen." We note plaintiff did not deny the incidents at his Workers' Compensation hearing. Coupled with the testimony from defendant's witnesses, as well as plaintiff's guilty plea, we find the window breaking incident occurred. We cannot, therefore, credit Dr. Dreyer's opinion regarding plaintiff's psychiatric state because we find it to be based on incorrect facts, e.g. that plaintiff was "framed." We, therefore, find plaintiff has not preponderated in showing he was psychiatrically disabled *Aquilina* v *General Motors Corp,* 403 Mich 206 (1978). *Deziel* v *Difco Laboratories, Inc,* (after remand) 403 Mich 1 (1978).

Plaintiff has not appealed the closed period award, so we choose not to deal with any question of an open award. We do affirm Administrative Law Judge Chisholm's finding of a closed period of disability, due to the back injury. It was basically admitted by defendant's representative that plaintiff had a back injury at work as evident by the following colloquy with defendant's representative:

> COURT: ". . . they were disputing the claim . . . for failure to appear for medical treatment."
>
> WITNESS: "Yes, Sir"
>
> COURT: "It wasn't for contention that the injury did not occur?"
>
> WITNESS: "No."

Despite defendant's contention that plaintiff was "grinning" after he fell, defendant's representative called the ambulance, and saw defendant taken away by stretcher. We find plaintiff has proven an injury by a prepon-

derance of the evidence *Aquilina, supra.* We further find that the injury did cause positive findings, including a finding of positive straight leg raising by Dr. Blau, and findings of atrophy by Dr. Tetalman and Dr. Gallant, as well as other findings previously discussed.

In view of plaintiff's very heavy work, and the problems engendered by moving machinery, we find plaintiff could not continue to do his regular job due to his injury or while on medication.

Defendant raises two other issues, however, concerning plaintiff's behavior in throwing rocks, and his ability to work, and also defendant's offer of favored work precluding plaintiff's entitlement to further compensation. We decide in plaintiff's favor on both. Dealing first with the favored work issue, plaintiff testified without rebuttal that he was taking a variety of pain-killing medications which made it unsafe for him to work around moving machinery, and which had a variety of side-effects. Whether or not he sufficiently explained his reasons to defendant for turning down the job offered, it is certainly credible and logical that medications for back pain have the side effects attributed to them by plaintiff. In addition, no specific offer of work was shown to have been extended to plaintiff by defendant.

The second issue, whether heaving a rock through a window proves plaintiff's ability to work, we also answer in the negative. One rock is certainly not the same as doing regular work in heavy industry. We agree with the reasoning in *Ocha* v *Ford Motor Co*, 1985 WCABO 109 that "occasional stints" do not present persuasive proof of ability to do regular, heavy work on a full time basis. That work, as described by plaintiff, required the

regular lifting of 75-80 pounds and was not disputed, as such, by defendant's called witnesses. We therefore affirm the administrative law judge modifying as to interest only.

Member Fernandez concurs.

Dated and entered at Lansing, Michigan, this 8th day of September, A.D. 1986;

Workers' Compensation Appeal Board

Ramona L. Fernandez
Sheila H. Hughes
Members

DEC. # 245

STATE OF MICHIGAN
WORKERS' COMPENSATION APPEAL BOARD

ROBERT WILLIAMS,
SS 379 80 9355,
PLAINTIFF,

VS.

HOFLEY MANUFACTURING COMPANY,
DEFENDANT.

This cause having come before the Appeal Board on appeal by defendant from the decision, mailed August 26, 1981, of Administrative Law Judge Chisholm, granting compensation benefits to plaintiff from March 19, 1980, until November 25, 1980; after due consideration of the evidence taken and the briefs of counsel, the Board having made a finding of facts and law, and it appearing to the undersigned Members of the Board that the decision made as aforesaid should be affirmed with modification of interest rate, Now, Therefore;

IT IS ORDERED, That the decision of the administrative law judge in this cause shall be and it hereby is affirmed with modification of the interest rate. All benefits due and not yet paid shall bear interest at the rate of 10% per annum. MCL 418.801 (6), effective July 30, 1985; *Selk* v *Detroit Plastic Products,* 419 Mich 1 (1984), (on resubmission) 419 Mich 32 (1984).

Dated and entered at Lansing, Michigan, this 8th day of September, A.D. 1986;

Workers' Compensation Appeal Board

Ramona L. Fernandez
Sheila H. Hughes
Members

APPENDIX D

MICHIGAN DEPARTMENT OF LABOR
BUREAU OF WORKERS' DISABILITY
COMPENSATION
LANSING, MICHIGAN 48909

DECISION

ROBERT WILLIAMS
Employee
Soc. Security 379-80-9355

vs.

HOFLEY MANUFACTURING
Employer-Insurer(s)

A hearing having been held July 31, 1981 at Mt. Clemens, Michigan on petition of (plaintiff), I find as follows:

That the above named employee (did) receive a personal injury arising out of and in the course of (his) employment by the above named employer on 3/19, 1980, and, as of said date of injury, said employee had an average weekly wage of $315.00, in (unskilled) labor, and had the following dependents: None.

IT IS THEREFORE ORDERED that said Defendant(s) pay compensation at the rate of $171.00 per week for partial/total disability to said employee from March 19, 1980 to November 25, 1980 inclusive, and at the rate of

$..... from ..... 19..... to ..... 19..... inclusive, and partial/ total disability to said employee.

* * *

IT IS FURTHER ORDERED that Date of no disability and no subsequent treatment exam of Doctor Tetalman.

Allan D. Chisholm
Administrative Law Judge

Signed this 31 day of July, A.D. 1981.

* * *

APPENDIX E

Michigan Supreme Court
Lansing, Michigan

ORDER
Entered: July 27, 1988

Dorothy Comstock Riley
Chief Justice

Charles L. Levin
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dennis W. Archer
Robert P. Griffin
Associate Justices

Rehearing No. 206

79949

SC 79949
CoA 95770
LC WCAB

ROBERT WILLIAMS,
Plaintiff-Appellee,

v

HOFLEY MANUFACTURING COMPANY,
Defendant-Appellant.

In this cause, a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

/s/ Jacqueline B. MacKinnon
Deputy Clerk

July 27, 1988

APPENDIX F

(Filed August 25, 1988)

STATE OF MICHIGAN
IN THE SUPREME COURT

S.C. No. 79949

ROBERT WILLIAMS,
Plaintiff-Appellee,

vs.

HOFLEY MANUFACTURING COMPANY,
Defendant-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Hofley Manufacturing Company, the defendant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Michigan Supreme Court entered in this action on June 9, 1988, rehearing denied July 27, 1988.

This appeal is taken pursuant to 28 USC §1257(2).

Respectfully submitted,

Plunkett & Cooney, P.C.
/s/ Paul F. Paternoster
Jonathan T. Kopit (P24250)
Paul F. Paternoster (P35642)
900 Marquette Building
Detroit, MI 48226
(313) 965-3900
Attorneys for Appellant

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

LAURA A. McLEOD, being first duly sworn deposes and says that on the 23rd day of August, 1988, she did serve a (1) Notice of Appeal to the Supreme Court of the United States, and (2) Proof of Service upon:

Robert A. Kozlow
600 Travelers Tower
26555 Evergreen
Southfield, MI 48076

Marylin Atkins, Chairperson
Workers' Comp. Appeal Board
Leonard Plaza Building
309 N. Washington
Lansing, MI 48909

by placing a copy of same in an envelope correctly and plainly addressed to the above named with postage fully prepaid thereon and placing same in the U.S. Mail, Detroit, Michigan.

All parties required to be served have been served.

Further deponent saith naught.

/s/ Laura A. McLeod
Laura A. McLeod

Subscribed and sworn to before me this 23rd day of August, 1988.

/s/ Colleen A. Simpson
Colleen A. Simpson
Notary Public
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My Commission Expires: 07-19-92

APPENDIX G

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 30th day of June in the year of our Lord one thousand nine hundred and eighty-seven.

Present the Honorable
Dorothy Comstock Riley,
Chief Justice

Charles L. Levin,
James H. Brickley,
Michael F. Cavanagh,
Patricia J. Boyle,
Dennis W. Archer,
Robert P. Griffin,
Associate Justices

79949

SC: 79949
CoA: 95770
LC: WCAB

ROBERT WILLIAMS,
Plaintiff-Appellee,

v

HOFLEY MANUFACTURING COMPANY,
Defendant-Appellant.

On order of the Court, the application for leave to appeal is considered, and it is GRANTED, limited to the

issue whether the defendant was denied due process because of the statutorily-authorized Appeal Board composition in this case which included a member "representative of the general public" and a member "representative of employee interest" but no member "representative of employer interest."

The clerk is directed to place this case on the October, 1987 session calendar. Briefs and appendixes are to be filed in conformity with MCR 7.309 except that the brief and appendix of the appellant is to be filed no later than August 11, 1987, and the brief and appendix, if necessary, of appellee is to be filed no later than 28 days after the date of filing by the appellant. The parties may file typewritten briefs and xerographic appendixes, to be followed by printed briefs and appendixes as soon as possible.

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 30th day of June in the year of our Lord one thousand nine hundred and eighty-seven.

/s/ Corbin R. Davis
Clerk.

JAN 6 1989
CLERK

No. 88-669

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

HOFLEY MANUFACTURING COMPANY,
Appellant,
VS.
ROBERT WILLIAMS,
Appellee,

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

Where the hearing referee's decision that Appellee was entitled to worker's compensation benefits was upheld by a unanimous two-member appeal board panel, comprised of one "public" representative and one "employee" representative, randomly assigned from an appeal board pool consisting of five "public" representatives, five "employer" representatives, and five "employee" representatives, was Appellant denied its Fourteenth Amendment due process right to a fair decisionmaker by the Michigan statutory scheme for assignments of worker's compensation appeal board panels?

Does this Court have jurisdiction to hear or decide Appellant's equal protection argument where it was not raised before, considered by, dispositive of, or even necessary to the final decision of the Michigan Supreme Court?

Assuming *arguendo* that this Court has jurisdiction to hear or decide the equal protection argument presented by Appellant, does Michigan's use of two-member panels (with a third member assigned in case of a split decision), a process intended to relieve documented docket congestion in the worker's compensation appeal board, deny Appellant equal protection as guaranteed by the Fourteenth Amendment?*

* All the parties appearing in the litigation before the Michigan Supreme Court are identified and set forth in the caption of this Motion.

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No. 88-669

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

HOFLEY MANUFACTURING COMPANY,
Appellant,
vs.
ROBERT WILLIAMS,
Appellee,

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellee, Robert Williams, moves the Court to dismiss the appeal filed by Hofley Manufacturing Company or, in the alternative, to affirm the judgment of the Supreme Court of Michigan [*Williams v Hofley Manufacturing Co*, 430 Mich 603; 424 NW2d 278 (1988)] on the grounds that the questions presented are so unsubstantial as not to need further argument and also that appeal of the second question presented has not been taken in conformity with the jurisdictional requirements of 28 USC 1257.

STATEMENT OF THE CASE

Appellee accepts Appellant's Statement of the Case, with the following additional background and facts presented for the Court's full understanding of the worker's compensation atmosphere existing in Michigan at the time the Worker's Compensation Appeal Board considered Appellee's appeal.[1]

The Worker's Disability Compensation Act, MCL 418.101–418.941, MSA 17.237(101)–17.237(941), has had a long and controversial history in Michigan. Since its enactment in 1969,[2] it has undergone almost yearly amendments in an attempt to reconcile the desire to compensate the injured employee with the desire to stimulate the business climate in the State of Michigan.

Those amendatory reforms could not stem the burgeoning caseload of the workers' compensation system, however, and by the early 1980's the situation had reached intolerable extremes, with five-year backlogs at the appellate level a matter of course.[3]

In furtherance of reform, therefore, Governor James Blanchard in 1983 appointed Professor Theodore J. St. Antoine of the University of Michigan Law School to be his special counselor on worker's compensation by analyzing the problems and recommending solutions. Professor St. Antoine's Report was submitted to Governor Blanchard on December 12, 1984.[4]

In his report, Professor St. Antoine described the onerous situation regarding the workers' compensation appellate docket:

> "...the accelerating rate and number of appeals in recent years have caused the Board's backlog to mush-

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[1] An excellent historical summary is presented in the Michigan Supreme Court's opinion at issue here (See Appendix to Appellant's Jurisdictional Statement, pp A7–A10).

[2] Michigan originally enacted a workmen's compensation act in 1912; the entire act was reorganized in 1969 and is popularly known as the Worker's Disability Compensation Act of 1969. All references in this Motion are to the 1969 Act.

[3] Royal, *Workers' Compensation Appeals: Due Process Denied?*, 66 Mich B J 982, 985 (October 1987).

[4] *St. Antoine, Workers' Compensation in Michigan: Costs, Benefits and Fairness* (1984).

> room from a mere 2,000 cases in 1976 to almost 7,000 as of November 1984. That is the equivalent of about five or six years' output by the Appeal Board."

By 1987, compensation appeals had continued to increase so that the Appeal Board's backlog exceeded 9,000 cases.[5] In response to Professor St. Antoine's recommendations, the Legislature in mid-1985 completely overhauled the workers' compensation system (1985 Mich. Pub. Acts 103).

The worker's compensation appeal board is comprised of 15 members, three of which are designated as "employee" representatives, three as "employer" representatives, and three as "general public" representatives. MCL 418.251, MSA 17.237(251). Prior to the 1985 amendments, appeals were heard by three member panels consisting of one representative from each designation, balancing the panels by guaranteeing an equal vote for all three interests. As Appellee has previously discussed, this panel composition was unable to keep pace with the rising tide of appeals.

In response to Professor St. Antoine's report, therefore, the Legislature changed the composition of appeal board panels. Pursuant to the 1985 amendment, panels were reduced to two-member panels, comprised of one member each from the employee and employer representatives, the employee and general public representatives, the employer and general public representatives, or two representatives of the general public. MCL 418.261, MSA 17.237(261).

In the event, however, that the two board members are unable to reach a unanimous decision, a third member from the 15-member pool is added, by random assignment, to the panel, from a group that is not already represented on the panel, except for a panel of two general public representative members, in which case the third member shall be a general public representative. The third member's vote shall be controlling and shall be considered the final decision of the board. MCL 418.261, MSA 17.237(261).

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[5] Royal, *supra* note 3, at 983.

Since under the pre-1985 scheme a majority of two votes was all that was necessary to reach a decision in favor of a litigant, the revised statutory scheme reflected the reality of the decisionmaking process. The revised scheme also continued to reflect the fact that members do not always reach unanimous decisions, in which case a third member's vote is controlling and outcome determinative. In the final analysis, a litigant under the 1985 system receives the same process as received under the previous system, with the added benefit of greater efficiency given that more appeal board panels are available to hear and decide appeal.

In the instant case, a hearing referee (whose impartiality is unchallenged) awarded Appellee compensation benefits. Pursuant to the statutory scheme in question, Appellant's appeal was assigned to a panel consisting of a "public" representative and an "employee" representative. The general public representative member of the Appeal Board authored the decision upholding the award of benefits, with the employee member concurring. As a result of that decision, Appellee was awarded $171 weekly for a nine-month period. Because the decision in favor of awarding benefits was unanimous, a tiebreaker vote by the employer representative was unnecessary.

Now, however, Appellant claims that its Constitutional right to a fair and unbiased Appeal Board was somehow violated because no employer representative was a member of the panel which unanimously found in favor of Appellant. The Legislative reduction of panel members lies at the heart of this appeal.

REASONS WHY THE APPEAL SHOULD BE DISMISSED AND THE DECISION OF THE MICHIGAN SUPREME COURT AFFIRMED

I. Where the Hearing Referee's Decision That Appellee was Entitled to Worker's Compensation Benefits was Upheld by a Unanimous Two-Member Appeal Board Panel, Comprised of one "Public" Representative and one "Employee" Representative, Randomly Assigned from an Appeal Board Pool Consisting of Five "Public" Representatives, Five "Employer" Representatives, and Five "Employee" Representatives, Appellant was not Denied its Fourteenth Amendment Due Process Right to a Fair Decisionmaker by the Michigan Statutory Scheme for Assignments of Worker's Compensation Appeal Board Panels.

Appellant contends that the statutory scheme providing for two-member panels of the Worker's Compensation Appeal Board, MCL 481.261, MSA 17.237(261), is inherently violative of its Due Process Rights because of a mere appearance of partiality of the member representatives.[6] It follows from a review of the cases previously decided by this Court that Appellant's due process claims present no constitutional infirmities which need be addressed by this Court.

Due Process guarantees that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, "generating the

[6] Before the Michigan Supreme Court, Appellant's argument was three-pronged. It contended that the statutory procedure contained constitutionally impermissable levels of bias resulting from three interests: 1) pecuniary interest resulting from the limited, four-year terms of appeal board members, 2) a statutorily designated interest, and 3) a perceived interest. Before this Court, however, Appellant appears to have abandoned its "pecuniary interest" argument and presents a hybrid "statutorily-designated/perceived interest" argument. In any event, the argument at this point appears based only on an alleged appearance of impartiality.

feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Comm v McGrath*, 341 US 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests absent a proceeding in which he is provided an opportunity to present his case with assurance that the decisionmaker is not predisposed to find against him. See generally *Marshall v Jerrico, Inc*, 446 US 238, 242 (1980).

Because the right to a fair and unbiased decisionmaker is so fundamental, it has been jealously guarded by this Court. However, the boundaries of due process are not limitless. As this Court explained in *Tumey v Ohio*, 273 US 510, 523 (1927):

> "All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion."

Interests which are found to be too remote and insubstantial to violate the constitutional constraints are routinely upheld by this Court.

Illustrative of this principle is *Schweiker v McClure*, 456 US 188 (1982), upholding from constitutional attack 42 USC 1395u. Rejecting the notion of derivative bias merely because of the decisionmaker's affiliation with the insurance carrier which contracted with the federal government to administer a portion of the Medicare program, this Court refused to adopt either the District Court's reliance on generalized assumptions of possible interest or its placement of special weight on the various connections of the hearing officers with the private insurance carriers.

Likewise in this case, Appellant presents nothing more than generalized assumptions of partiality based on a panel member's designation as "employer" or "employee" representative. This claims flies in the face of the often enunciated presumption that hearing officers are unbiased and that

the statutory enactment is constitutional. See *Withrow v Larkin*, 421 US 35, 47 (1975).

Appellant's presumptive argument also ignores the legislative purpose to create a board of independent stature, whose members would exercise independent, professional judgment in hearing appeals. MCL 481.251, MSA 17.237(251).

Prior decisions of this Court illustrate the scope of constitutionally impermissible interests which disqualify a decisionmaker. For example, constitutional deprivations arise from a decisionmaker's direct and financial stake in the outcome of the matter [*Tumey v Ohio, supra*]; from financial benefit which may accrue to the agency or unit of government making the decision and the person making the decision is closely identified with the operation of that agency [*Ward v Village of Monroeville*, 409 US 57 (1972)]; from indirect but substantial pecuniary interest in the outcome of or possibility of personal success from the decision [*Gibson v Berryhill*, 411 US 564 (1973)]; or from direct, personal, substantial, and pecuniary interest in the outcome of the decision because of pending litigation filed by the decisionmaker which contains the same dispositive issues; in that case the decisionmaker's opinion would have the clear and immediate effect of enhancing both the legal status and the settlement value of the decisionmaker's own case [*Aetna Life Ins Co v Lavoie*, 475 US 813 (1986)].

As these cases illustrate, more than a mere possibility of bias or predisposition is necessary to rise to the level of a constitutional infirmity. At some point, the alleged biasing influence is too remote and insubstantial to violate the constitutional restraints. The claimed "bias" in this case does not even approximate the predisposition claimed in *Withrow v Larkin*, 421 US 35 (1975) or *Hortonville Dist v Hortonville Ed Assoc*, 426 US 482 (1976); yet both of those cases resulted in a rejection of claimed due process violations.

Appellee submits that Appellant's claims presented here fall considerably short of the line between permissible influ-

ences and constitutional deprivations. "Under a realistic appraisal of psychological tendencies and human weaknesses," *Withrow v Larkin*, 421 US at 47, it is exceedingly improbable that the Appeal Board panel members' decisions would be distorted merely because of his or her designation as employer or employee representative.

Although decided on statutory rather than a constitutional basis, Justice (now Chief Justice) Rehnquist's discussion in *Laird v Tatum*, 409 US 824, 833–35 (1972) is particularly helpful. In discussing the circumstances under which a judge must recuse him or herself, Justice Rehnquist stated:

> "I do not doubt that a litigant in the position of respondents would much prefer to argue his case before a Court none of whose members had expressed the views that I expressed. . . .
>
> • • •
>
> The Term of this Court just past bears eloquent witness to the fact that the Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities.
>
> • • •
>
> Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another."

Without any evidence of actual or highly probable bias or substantial probability or possibility of profit or personal interest, this Court cannot accept Appellant's bare contentions that the panel member's designation violates standards of procedural fairness embodied in the due process clause merely because they came to the Worker's Compensation

Appeal Board imbued with certain philosophies which guide their judgment in the cases before them. As the cases of this Court instruct, Appellant's contentions present a situation too remote and insignificant to upset the legislature's procedural scheme.

Appellant finds major fault with Justice Brickley's concurring opinion (which was also signed by Justice Levin, a member of the majority). Properly reduced to its essence, Justice Brickley's opinion appears to raise two points: 1) he agrees with the majority that no due process violation is presented by Appellant, and 2) he disagrees both with the majority's characterization of "representative" and with its conclusion that the general public representative member's vote cures any biases of the employee or employer members.

Despite Justice Brickley's disagreement with the majority opinion, however, he expressly agreed that a due process claim is absent in this case (See Appellant's Appendix to Jurisdictional Statement, pp A32–33). Consequently, the Michigan Supreme Court's opinion in *Williams v Hofley Manufacturing Co* must be viewed for what it is and for what it clearly stands: It is a decision signed by five members of the Court finding no due process violation presented in this case. It also presents two minority concurrences in favor of raising (but not deciding) an equal protection question; and two dissenting opinions finding a due process violation.

Despite Appellant's claims to the contrary, it is irrelevant for purposes of this appeal that some members of the Michigan Supreme Court disagreed with the prevailing members' characterization of "representative."[7] The final outcome of the case was to reject Appellant's claims of pecuniary, statutory, and perceptive bias. *Williams* stands for the proposition that more than mere assumptions of bias based on

[7] It is also unclear whether Justice Levin did in fact disagree with his own characterization of "representative." It is entirely possible that he agreed only that an equal protection, rather than a due process, question was presented by Appellant and not that the majority's characterization of "representative" was incorrect.

identification of an Appeal Board panel member with a certain representative group must be presented for a due process violation to arise.

Appellant's attempt to invoke a *Mathews* analysis [*Mathews v Eldridge*, 424 US 319 (1976)] is misplaced. Because the Michigan Supreme Court found that the Appeal Board panel which decided this case was not infected with impermissible bias, it had no reason to reach the question of what process was due to alleviate the constitutional deprivation. Even if the question were reached, however, Appellant would garner no greater success.

Conceding that Appellant has a substantial private interest at stake vis-a-vis worker's compensation decisions, the question then becomes one of an assessment of the utility of the procedural rights that are being requested. In other words, the reviewing court must perform a procedural cost-benefit analysis. Viewed properly, the question becomes: whether Appellant would have acquired a different decision had an employer representative been on the Appeal Board panel.

The member of the panel which decided in favor of Appellee was the general public representative. The second panel member, an employee representative, concurred. Therefore, even assuming an employer representative were added to decide Appellee's application and assuming further that that member would vote against awarding compensation, that dissenting vote would have no affect on the outcome of this case. It would be merely superfluous.

Looking at the same question from the broad perspective of all worker's compensation litigants, the same conclusion results. Given the intolerable state of affairs existing at the time the 1985 amendments were enacted, the state's paramount interest in amending MCL 418.261, MSA 17.237(261) was to eliminate the five-year backlog at the appellate stage so as to achieve substantial justice for both employees and employers. Reducing the panels to two-member groupings was viewed as one way to achieve more efficient panels

because in reality only two members' votes were necessary to decide an appeal. So as to achieve constitutional balance, however, the Legislature further provided that no panel could be biased in favor of either the employer or employee by having either two employer representatives or two employee representatives as the sole decisionmakers. The Legislature further provided that in the case of a split decision, a third panel member would be added (who was not already represented on the panel) to control the outcome of the appeal.

Under the above set of facts, the Legislature was achieving its goal of increasing the number of panels available to hear and decide appeals, thus reducing the outrageous backlog, without any comparable reduction in the objective nature of that decisionmaking. Therefore, even assuming (as Appellant does) that the general public representative always sides with either the employer representative or the employee representative,[8] then adding a third member (in this case an employer representative) to the panel would be superfluous inasmuch as the final outcome would be two votes in favor of the employee to one in favor of the employer. In fact, that was exactly the outcome which occurred in this case.

Appellant adds that it would cost no more for the State to return to three-member panels. Quite to the contrary, however, three-member panels were the norm for many years; yet the backlog of appeals continued to multiply almost geometrically before Professor St. Antoine's helpful and articulate report sparked legislative overhaul in 1985. Appellee submits that the cost of instituting the procedure suggested by Appellant would indeed be costly, both to employees who must endure a seemingly endless number of years wait-

[8] Appellant apparently enjoys a love-hate relationship with the general public representative. On the one hand, Appellant assumes that the general public representative member can never be trusted to make a fair and impartial decision inasmuch as he or she will always side with one of the two other members. On the other hand, Appellant later argues that the general public member can be trusted enough when added as a third member of the panel because then his or her vote will not be swayed by either member. Only the latter argument is consistent with the presumption in favor of independence and impartiality.

ing for compensation and to employers who will continue to be subject to the 70 percent rule, MCL 418.862, MSA 17.237(862) [(requiring employer to pay 70 percent of current weekly benefits during appeal if the administrative law judge finds in favor of the employee) (upheld against constitutional attack in *McAvoy v H B Sherman Co*, 401 Mich 419 (1977)]. In addition, the somewhat abstract cost of reducing public confidence in the system, thus contributing to further erosion of Michigan's industrial climate, could be substantial.

Therefore, from a procedural cost-benefit analysis, Appellant's additional procedures will add little in the way of procedural protection while resurrecting the procedural quagmire which resulted in the multi-year backlog of appeals.

For the many reasons set forth above, this Court must conclude that Appellant raises no due process questions which have not been previously addressed and answered by this Court. Consequently, Appellee requests that this Court dismiss this appeal and affirm the decision of the Michigan Supreme Court.

II. This Court has no Jurisdiction to Hear or Decide Appellant's Equal Protection Argument Where it was Not Raised Before, Considered By, Dispositive of, or Even Necessary to the Final Decision of the Michigan Supreme Court.

Appellant candidly admits that the equal protection question was not properly raised before the Michigan Supreme Court. This Court's jurisdiction to review cases calling into validity state statutes is provided by 28 USC 1257. This Court's interpretation of that statute has given rise to four requirements which must be satisfied before this Court will assume jurisdiction: the question must have been 1) raised, 2) considered, 3) disposed of, and 4) necessary to the outcome of the Michigan Supreme Court. *Crowell v Randell*, 35

US 368 (10 Pet) (1836); *Illinois Central R Co v Kentucky*, 218 US 551 (1910); *Godchaux Co v Estopinal*, 251 US 179 (1919); *Radio Station WOW v Johnson*, 326 US 120 (1945); *Beck v Washington*, 369 US 541 (1962); *United Air Lines v Mahin*, 410 US 623 (1973). Examining each of those requirements, it becomes evident that Appellant has not satisfied these jurisdictional requirements.

Even Appellant concedes that the equal protection question was not raised in any court below until after the two concurring Supreme Court Justices *sua sponte* voiced their equal protection concerns. Although Appellant claims that this concurring opinion sparked its Motion for Rehearing before the Michigan Supreme Court, it has not offered the Motion to this Court for its review. Rather, Appellant summarizes its Motion for Rehearing in its Statement of the Case. (See Appellant's Jurisdictional Statement at 7: Appellant disagreed with majority's interpretation of "representative" and claimed manifest injustice since there was no clear majority as to the due process question.) This explanation does not expressly state that the equal protection question was expressly raised in Appellant's Motion for Rehearing. Therefore, Appellant cannot satisfy even the first jurisdictional requirement that the issue be raised in the state court.

Although the equal protection question was considered by the two concurring Justices, it is not enough to explain that a question was considered and decided below by citing to the discussion in the concurring opinion. Closely related to the final jurisdictional requirement that the question be necessary to the outcome of the decision below, Appellee has already discussed that the opinion by the two concurring jurists is superfluous to the outcome of the state court decision inasmuch as a majority of five Justices found no due process problem here. Even assuming two Justices would conclude that an equal protection violation exists here, their opinion would not control or even have any effect on the final disposition in favor of Appellee. Consequently, Appel-

lant cannot satisfy either the second or fourth jurisdictional requirements.

In any event, the Motion for Rehearing was summarily denied by the Michigan Supreme Court. Therefore, there is no showing that the full court considered the equal protection question on its merits. This is an additional reason why this Court has no jurisdiction here.

Finally, even assuming *arguendo* that Appellants can reach the third jurisdictional requirement, close scrutiny of the concurring opinion shows that the question, although raised, was not decided by the concurrence: "It is not in my view the weighing of this panel itself, but the irrational manner in which this litigant has been singled out for a less favorable and receptive panel than others similarly situated that raised a constitutional question." (See Appellant's Jurisdictional Statement at A33.) Justice Brickley never discussed the merits of that question. Thus, even assuming that Appellant properly raised the question at the appropriate point in the proceedings (which it did not), and assuming that the entire state court considered the merits of the equal protection (which it did not), the court never disposed of the question inasmuch as the concurrence merely raised the question without reaching a final disposition.

This Court has, on rare occasions, addressed a question not raised below where the federal question arose from an unanticipated ruling of the state court, the petition for rehearing presented the first opportunity to raise it, and that opportunity was seized. Accordingly, in *Brinkerhoff-Faris Trust Co v Hill*, 281 US 673 (1930), where the state supreme court overruled long-standing precedent in reaching its decision, the federal question was addressed by this Court inasmuch as Appellant had no reason to doubt the authority of the overruled case when it presented its appeal to the state court. See also *Missouri ex rel Missouri Ins Co v Gehner*, 281 US 313 (1930); *Saunders v Shaw*, 244 US 317 (1917).

Upon close review, this case is not within that narrow exception, as there was no unexpected reconstruction of a

statute which resulted in the loss of a remedy or an unanticipated reconstruction of a statute threatening a litigant's constitutional rights. In addition, even assuming this case does present one of those two narrow circumstances, it is not clear on this record that Appellant seized the opportunity to fully address the merits in its Motion for Rehearing.

Rather, it appears that the two concurring Justices, as a matter of strategy, would have challenged the statute on an equal protection, rather than a due process, basis. However, Appellant waived its opportunity to raise an equal protection question by not raising it fully at any point in the proceedings below. Further, the two concurring Justices' opinion was neither dispositive of the equal protection question nor necessary to disposition of this case.

Under these set of facts, this Court is without jurisdiction to hear Appellant's equal protection claims. This Court must therefore dismiss the appeal as to the second question presented for want of a properly preserved federal question under 28 USC 1257.

III. Assuming *Arguendo* that this Court has Jurisdiction to Hear or Decide the Equal Protection Argument Presented by Appellant, Michigan's use of Two-Member Panels (With a Third Member Assigned in Case of a Split Decision), a Process Intended to Relieve Documented Docket Congestion in the Worker's Compensation Appeal Board, Does Not Deny Appellant Equal Protection as Guaranteed by the Fourteenth Amendemnt.

Resting on the presumption that this Court will exercise its prerogative power to assume certiorari jurisdiction and address the equal protection question presented, Appellant's argument then follows along the lines of the concurring Jus-

tices' opinion.[9] The argument, simply put by Appellant, is that litigants are forced to assume an unequal and disadvantaged footing before the Appeal Board for no reason which is rationally related to the State's purpose.

The fatal flaw in Appellant's argument is that it focuses on a portion of the system rather than on the system in its entirety. Appellant never attacks the Appeal Board composition established in MCL 418.251, MSA 17.237(251): a Board of 15 members made up of equal numbers of employer representatives, employee representatives, and general public representatives. Rather, Appellant contests the way the panel members are combined.

Since this claim is couched in terms of reasonableness and relation to a proper purpose rather than a claimed deprivation of a fundamental right or discrimination against a suspect class, the proper standard is the one enunciated by this Court in *McGowan v Maryland*, 366 US 420, 425–26 (1961):

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their

[9] Appellant's argument is somewhat confusing at this point. It appears to be saying that the equal protection analysis may be performed within the confines of the due process challenge (in an apparent attempt to bypass the fundamental jurisdictional problem discussed *supra*), thereby implying that the two questions are merely two sides of the same coin. Relying on the concurring Justices' equal protection concerns, Appellant somewhat inconsistently concludes that it was not afforded its due process rights because it was not on an equal footing with other litigants before the Appeal Board.

Having so concluded, Appellant proceeds to candidly admit lack of presentation to the Michigan Supreme Court, requesting this Court's exercise of its prerogative power to grant certiorari in this case. Following this request, however, Appellant fails to argue the merits of its equal protection question. Therefore, it appears that once again Appellant has not addressed the question at the proper point in this litigation.

> constitutional power despite the fact that, in practice their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it (citations omitted)."

Consequently, the equal protection question entails inquiry into the reasons behind the Legislature's creation of two-member panels and the level of inequity, if any, which resulted.

As Appellee has already detailed, the backlog facing the Appeal Board was intolerable in the mid-1980s. Consequently, the Michigan Legislature took a look at the composition of the Appeal Board to determine a way to increase the efficiency of the members without destroying the overall balance of the Board. Logically, in any case where two members of the Board agree on an outcome, the third member's vote is superfluous.

Consequently, a logical and reasonable approach to the problem was to create a balanced two-member panel, to which a third member would be added in the event the third member's vote would affect the result. In this way, more panels would be available to decide appeals, without upsetting the overall balance.

With this background in mind, the next consideration is to focus on the effect to individual litigants of the Legislature's re-composition of the Appeal Board. By reducing Appeal Board panels to two members, litigants were not losing the opportunity to have their appeals heard. Similarly, the decision by the panel continued to be balanced and avoided the danger of a decision permeated with bias in favor of either the employer or the employee. Appellant here does not contest either of these conclusions. Rather, Appellant claims that the mere fact that it lost an opportunity to "ha[ve] the public representative's ear", Appellant's Jurisdictional Statement at 10, reeks of equal protection deprivations.

The problem with this argument, however, is that it does not reach the level of a constitutional infirmity. Loss of a mere opportunity to convince the public representative's

vote implies that the general public representative cannot reach a decision without influence from either the employer or the employee representative. In fact, Appellant presumes throughout its argument that no Appeal Board member is ever impartial and that the member will always vote in favor of his or her designation. In fact, that is not at all the case; and members frequently depart from their designated representation when the facts or underlying law of any given case so requires.[10]

Appellant's argument further ignores the fact that employee litigants are similarly subject to the same constitutional "deprivation" alleged by Appellant. Just as employer litigants will have their appeals decided by employee/general public representative Boards, so may employee litigants have their appeals decided by employer/general public representative Boards. Thus, the concurring Justices' concerns that employer litigants are "singled out for a less favorable and receptive panel than others similarly situated" (See Appendix to Appellant's Jurisdictional Statement at A33) is difficult to understand given that employee litigants are similarly subject to the randomness of the panel-assignment process.

The Legislature is not duty bound to reach the perfect solution to every problem. It follows, therefore, that merely because worker's compensation litigants are subject to Boards composed of differing representatives does not mandate a finding against its constitutionality. Rather, it is only where the Legislature acted without any apparent reasonable motivation that the classification will fall. As Appellee has discussed, the Legislature was faced with an emergency situation and responded by adopting a methodology of reducing the crisis with no significant harm to litigants. Under this set of circumstances, it cannot be said that the Legislature's system is endemically unfair.

That conclusion is particularly true here, where the general public member of the Appeal Board affirmed the hear-

[10] Royal, *supra* note 3, at 985.

ing referee's decision in favor of Appellant, with the employee member concurring with the general public member. Assuming that this Court affords Appellant the process which it now claims it constitutionally deserves, the appeal board outcome will not change. Appellee will still be granted his compensation, with the employer member dissenting.

In the final analysis, the facts presented in this case are really no different from many other situations where panels, or groups, of individuals assemble to decide a certain matter.

This Court has long held that a criminal defendant has no constitutional right to be indicted or tried by any particular jury or by a jury composed in part of members of the defendant's race or class. See, e.g., *Viriginia v Rives*, 100 US 313 (1880); *Martin v Texas*, 200 US 316 (1906); *Thiel v Southern Pacific Co*, 328 US 217 (1946); *Swain v Alabama*, 380 US 202, reh den 381 US 921 (1965); *Apodaca v Oregon*, 406 US 404 (1972).

In short, employer-worker's compensation litigants may be entitled to avoid *systematic* exclusion of employer representatives from the Appeal Board. However, employer litigants have no Fourteenth Amendment right to precisely proportional representation on every individual panel.

Reference is also made to the appellate system in Michigan, which closely resembles the Appeal Board system in that the legislature has created a pool of judges from which three-member panels are drawn to decide an appeal. Admittedly, those judges came to the court imbued with certain philosophies and biases. Yet, no one would argue that judges who enjoyed a career as a county prosecutor prior to appointment or election to the Court of Appeals must necessarily be disqualified from hearing all criminal appeals merely because of that background.

The same argument applies where a jurist dies during the pendency of an appeal. The practical reality of that situation is that it would be a waste of judicial time and resources to

start over again merely because a litigant had lost the opportunity for the deceased jurist's input into the decision.

In fact, even trial judges come to the court endowed with certain inbred biases and philosophies; yet a litigant would be hard pressed to successfully obtain a judge's disqualification without a greater showing of bias.

In the end, Appellant's equal protection argument must fail because it focuses not on any systematic and invasive prejudice resulting from widescale and intentional exclusion of any group from the Appeal Board but rather on the lone fact that, through the luck of the draw, employer representatives may not be part of the panel that decides an employer litigant's appeal. As the long line of jury selection cases cited above reflect, Appellant's claims do not rise to the level of a constitutional infirmity.

Consequently, Appellant's equal protection question must be summarily dismissed without oral argument for the reason that it is unsubstantial under the prior decisions of this Court. Appellee therefore requests that this Court dismiss this appeal and affirm the decision of the Michigan Supreme Court.

CONCLUSION

For all of the above reasons, Appellee respectfully requests that this Court dismiss the appeal filed by Hofley Manufacturing Company or affirm the decision of the Michigan Supreme Court in *Williams v Hofley Manufacturing Co*, 430 Mich 603; 424 NW2d 278 (1988), upholding MCL 418.261, MSA 17.237(261), against constitutional attack

Respectfully submitted,

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